PROCEEDINGS AND ORDERS

DATE: 01/29/86

CASE NBR 85-1-0577e CSY
SHORT TITLE Bracy, William
VERSUS Arizona

DOCKETED: Nov 4 1985
TIME QUESTION

Date	Proceedings and Orders
Nov 4 1985	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Dec 5 1985	Brief of respondent Arizona in opposition filed.
Dec 12 1985	DISTRIBUTED. January 10, 1986
Jan 13 1986	REDISTRIBUTED. January 17, 1986
Jan 21 1986	REDISTRIBUTED. January 24, 1986
Jan 27 1986	The petition for a writ of certiorari is denied. Justice Brennan, dissenting: Adhering to my views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v. Georgia, 428 U.S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case. Dissenting opinion by Justice Marshall. (Detached opinion.)

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

NO. 85-5776

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

WILLIAM BRACY,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Arizona.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

WILLIAM BRACY
Register Number C-01532
Box 99
Pontiac, Illinois 61764

Petitioner, pro se

...STIONS PRESENTED FOR REVIEW

A.

Whether petitioner's constitutional rights were abridged by the prosecution's misconduct involving intentional prosecutorial nondisclosure of evidence and misconduct exclusive of nondisclosure of evidence?

B.

Whether petitioner's identification and the circumstances surrounding it failed to comport with due process requirements?

C.

Whether petitioner's Sixth Amendment right to confrontation was violated when his attorney was denied the right to cross-examine a prosecution witness about information relevant to impeachment of that witness?

D.

Whether petitioner was denied a fair trial by the trial court's admission of gruesome and highly inflammatory photographs which prejudiced the jury against him?

E.

Whether petitioner was denied due process of law when the prosecutor commented on petitioner's failure to testify in his own behalf?

F.

Whether the Arizona death penalty statute is unconstitutional because (1) it fails to allow the jury to take part in the sentencing determination, and (2) it fails to give the trial judge guidance on how to weigh mitigating factors against aggravating factors?

PARTIES TO THE PREVIOUS PROCEEDINGS

The parties before the Supreme Court of the State of Arizona were William Bracy, petitioner here, and the State of Arizona, the respondent here.*/

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*/ The respondent's attorney is Robert K. Corbin, Arizona Attorney General, who maintains an office at 1275 West Washington Street, Phoenix, Arizona 85007. To facilitate service upon the respondent, petitioner is serving notice of the petition for writ of certiorari upon the respondent's aforesaid attorney, as well as upon the Office of the Maricopa County Attorney, 400 East Superior Court Building, 101 West Jefferson Street, Phoenix, Arizona 85003.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

WILLIAM BRACY, Petitioner

-vs-

STATE OF ARIZONA, Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF ARIZONA

The Petitioner, William Bracy, respectfully prays that a Writ of Certiorari issue to review the judgment and order of the Supreme Court of the State of Arizona entered on June 10, 1985.

I.

REFERENCE TO OPINION BELOW

The reported opinion of the Supreme Court of the State of Arizona was entered on June 10, 1985. A copy of the opinion is attached hereto as Appendix A.*/ A Motion for Reconsideration was filed and was subsequently denied on August 24, 1985.

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*/ References to materials in the appendices to this petition are designated "App. ___." It should perhaps be noted that all hand-written notations on the opinion were made by either petitioner or others. Such notations are not part of the opinion.

II.

JURISDICTION

The judgment of the Supreme Court of the State of Arizona affirming petitioner's convictions and sentences was entered on June 10, 1985. A Motion for Reconsideration was denied on August 24, 1985. This Petition is filed within sixty (60) days of the judgment of the Supreme Court of the State of Arizona. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent language of the constitutional and statutory provisions involved is set forth in full in the Appendix. (App. B) They are the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, and Section 13-703 of the Arizona Revised Statutes.

IV.

STATEMENT OF THE CASE

The Petitioner, William Bracy, and Joyce Lukezic were charged by indictment filed on August 27, 1981, in the Superior Court of Arizona, Maricopa County, Cause No. CR-121686, with the following offenses: Count I, CONSPIRACY TO COMMIT FIRST DEGREE MURDER, a Class 1 felony; Counts II and III, FIRST DEGREE MURDER (PREMEDITATED), Class 1 felonies; Count IV, ATTEMPTED FIRST DEGREE MURDER, a Class 2 dangerous felony; Counts V, VI and VII, ARMED KIDNAPPING, Class 2 dangerous felonies; Counts VIII, IX and X, Class 2 dangerous felonies; and Count XI, BURGLARY IN THE FIRST DEGREE, a Class 2 dangerous felony. In the conspiracy count (Count I) Robert Charles Cruz and Edward Lonzo McCall were named

as co-conspirators. Petitioner entered pleas of "NOT GUILTY" to all of the charges contained in the indictment.

On October 18, 1982, this matter proceeded to trial before a jury. On December 24, 1982, the jury returned verdicts of "GUILTY" against petitioner and his aforesaid co-defendant on all counts contained in the indictment. Thereafter, petitioner was arraigned on an allegation of two (2) prior convictions. He waived his right to a trial by jury on those allegations and on January 6, 1983, that matter was heard by the trial judge. On January 12, 1983, the trial judge returned a finding that petitioner was guilty of two (2) prior convictions. Thereafter, on February 4, 1983, a presentence hearing was held and on February 11, 1983, the trial judge returned his special verdict on Counts II and III and sentenced petitioner as follows: Count IV, 35 years to commence on February 11, 1983, with credit for 353 days of presentence incarceration; Counts V, VI and VII, 35 years on each count to run concurrently with each other but consecutively with Count IV; Counts VIII, IX and X, 35 years on each count to run concurrently on each count but consecutively to Counts V, VI and VII; Count XI, 35 years to run consecutively to Counts VIII, IX and X. On Count I, petitioner was sentenced to a life term to run consecutively to Count XI. As to Counts II and III, the petitioner was sentenced on each count to suffer the penalty of DEATH by lethal gas.

On February 16, 1983, the clerk of the court filed a notice of appeal and on March 10, 1983, counsel was appointed to represent petitioner on the appeal.

In April of 1983, petitioner filed a motion to vacate judgment pursuant to Rule 24 of the Arizona Rules of Criminal Procedure and the appeal was suspended. The trial court took testimony on that motion in July and September of 1983, and on October 20, 1983, the trial court denied the motion after making findings of fact. Thereafter, the appeal was reinstated. The Supreme Court of the State of Arizona

in an opinion filed on June 10, 1985, affirmed petitioner's convictions and sentences. (App. A) Thereafter, a motion for reconsideration was filed with the Supreme Court of the State of Arizona. On August 24, 1985, the Motion was denied.

V.

REASONS FOR GRANTING CERTIORARI

A.

THE PETITIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE REPEATED ACTS OF INTENTIONAL AND WILLFUL MISCONDUCT BY THE GOVERNMENT ATTORNEYS AND INVESTIGATOR, ALL OF WHICH DEPRIVED PETITIONER OF HIS RIGHTS TO A FAIR TRIAL AND TO DUE PROCESS OF LAW.

A review of the trial transcripts in this case demonstrates that the government's lawyers and one of its investigators, from the beginning to the end of this prosecution, intentionally sought to obstruct the petitioner in the preparation of his defense, to withhold critical evidence and engaged in tactics which could only have been designed to deprive petitioner of his right to a fair trial and to due process of law as those rights are guaranteed to him by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. In support of this claim, this Court's attention is directed to the acts set forth below which cover the time frame of this prosecution.

On April 22, 1982, the government lawyers opposed a request by petitioner to be provided transcripts in related proceedings. (RT of April 22, 1982 at pp. 48-49) Government counsel again opposed this request a few weeks later. The reason for the opposition was that it was the government's obligation to see that state money was spent only when the petitioner needed it. (RT of May 17, 1982 at pp. 54 and 57)

On June 18, 1982, petitioner requested the use of a county Westlaw computer for use in the preparation of his defense. The government had such a computer in its office and petitioner wanted to use the one in the county law library. Government counsel opposed this request claiming that petitioner had to show a specific need for this computer. (RT of June 18, 1982 at pp. 124-127)

On June 18, 1982, the petitioner sought access to the home where the homicides occurred. The Government lawyers opposed this request unless they could be present. They acknowledged that they wanted to be present to see what the defense was doing. (RT of June 18, 1982 at pp. 167-172)

On September 3, 1982, the petitioner and his co-defendant made a specific request for the names of all persons who had agreements with the state in this case, the agreements themselves and the amount of any funds provided for by the agreement. (RT of September 3, 1982 at pp. 4 and 15) The significance of this specific request and the date thereof will be apparent below.

On October 13, 1982, approximately two weeks before the trial was scheduled to start, petitioner was provided with a departmental report which contained extremely damaging statements allegedly made by him to another witness. The statements themselves were characterized by the trial judge as "horribly incriminating." The trial judge stated that he was satisfied that the government had this information as early as February 23, 1981. He further stated that he was gravely concerned that information of this magnitude came out two weeks before the time set for trial. (RT of October 13, 1982 at pp. 16-30)

Prior to the trial, the petitioner and his co-defendant had filed a request for a Desserault hearing regarding their identification by two government witnesses. It was agreed by all parties that in order to accommodate these witnesses, the hearings would be held after the trial had started. Nevertheless, Mr. Brownlee, one of the government lawyers, in his opening statement, told the jury that these same witnesses would positively identify petitioner and Hooper. At the hearing on the motion for mistrial, the trial court characterized this conduct as overreaching and threatened Brownlee with contempt if it happened again. (RT of November 2, 1982 at pp. 34-40)

On November 3, 1982, the day following Brownlee's opening statement, it became apparent to the Court and defense counsel that Mr. Brownlee, a few weeks prior to the start of the trial, had given an interview and posed for pictures to be used in an article in a local magazine. Statements were made concerning this case. It is apparent from the reporter's transcript that Brownlee knew that the article would probably be published around the time the trial in this case would start. (RT of November 3, 1982)

A review of the transcripts of the proceedings prior to trial demonstrates that a substantial portion of petitioner's defense was his claim that he had been misidentified by Mrs. Redmond, one of the victims. This defense was based, in part, upon statements of Mrs. Redmond contained in a police report authorized by Officer Perez. On November 3, 1982, after the trial had started and after petitioner had fashioned his defense, the government lawyers revealed to the defense and to the trial court that certain notes of Officer Perez (which had not been furnished to the defense) sharply contradicted the contents of this police report upon which petitioner had partially based his case. (RT of November 3, 1982 at pp. 253-257)

Another part of petitioner's defense was that three persons matching the initial description of the assailants given by Mrs. Redmond were arrested and later released by the police on the night of the killings. No photographs or police reports concerning these arrests were ever furnished to the defense. Nevertheless, on November 9, 1983, the government revealed the existence of photographs of these persons and attempted to use them during the trial. When government counsel persisted in his attempt to use these photos, the trial judge felt obliged to threaten him with a contempt citation. (RT of November 9, 1982 at pp. 299-307)

During the trial, Arnold Merrill, a co-conspirator and perhaps the key government witness in addition to Mrs. Redmond (See RT of Sept. 30, 1982 at p. 32) acknowledged

that while he was in custody, county attorney investigator Dan Ryan arranged for his removal from jail so he could have sex with his wife. (RT of November 18, 1982 at p. 98)

On November 22, 1982, government counsel for the first time disclosed the existence of police reports concerning the three men who were arrested and released on the night of the homicides. (RT of November 22, 1982 at pp. 18-30) These reports indicated that these three persons could not be excluded because of the time and location of their arrest - the reason originally given by the police for releasing them. (RT of November 22, 1982 at p. 19) The trial judge observed that he had been led to believe that such reports did not exist. (RT of November 22, 1982 at p. 24) He further stated that the information contained in the reports was pertinent to the case and should have been provided under Rule 15. (RT of November 22, 1982 at p. 25)

On November 23, 1982, the defense learned for the first time that another key government witness, Nina Marie Louie, had entered into a written agreement with the state pursuant to which she received lodging and money from the state totaling $878.00. (RT of November 23, 1982 at pp. 65-72)

On December 20, 1982, Daniel Ryan denied taking Merrill out of the jail for purposes of obtaining sex. (RT of December 20, 1982 at pp. 77-78)

On December 21, 1982, during his final argument to the jury, prosecutor Brownlee urged the jury to draw an adverse inference from the fact that a witness (not the petitioner or his co-defendant) had not appeared at the trial. (RT of December 21, 1982 at pp. 142-143)

In July and September of 1983, the trial court held hearings on petitioner's motion to vacate judgment. During those hearings the following matters came to light for the first time. As a result of these hearings the trial court found:

1. That Dan Ryan, county attorney investigator, prior to the trial of this matter, advanced monies to Merrill's wife for car payments on two occasions which

in each instance was an amount of $414.00. That only partial reimbursement was made. Further, that these payments were a distinct benefit to the Merrills.

2. That Mrs. Merrill received approximately $3,000.00 from the county attorney's protected witness program. Evidence at the hearing showed that all of this assistance was received prior to trial.

3. That Merrill made approximately 22 long distance calls from the county attorney's office, some of which were with the knowledge and consent of Dan Ryan. See minute order of October 20, 1983.

The foregoing matters do not constitute all of the acts of misconduct of the prosecution team in this case. Space limitations simply does not allow a complete exposition of this offensive behavior. These acts are set forth to demonstrate that from start to finish the prosecution team sought to interfere with and obstruct the preparation and presentation of petitioner's defense. Unquestionably, they were successful.

Although many of the matters set forth above, taken by themselves, would not justify the granting of a mistrial, all of the matters, taken in the aggregate, compel the conclusion that the trial court should have mistried the case rather than submitting it to a jury on account of denial of a fair trial. By the end of the trial, the intent and purpose of the government lawyers and their investigator, Ryan, was crystal clear: They were above the law. Bracy and Hooper were guilty as hell of the most heinous crime in Maricopa County in living memory and this prosecution team would literally stop at nothing to convict them. And they didn't.

After the trial judge entered his order denying the motion to vacate judgment he made the following part of his order:

> The Court further determines that a cavalier, almost holier-than-thou attitude existed on the part of some of the prosecution team as evidenced

> by the overreaching, "I didn't think it mattered" blase at times, disinterested, its-none-of-your-business attitudes taken at various points during these entire proceedings.
>
> These attitudes hampered the smooth processing of these matters during all stages and at all times caused unnecessary antagonisms between the prosecution and defense teams.
>
> The Court is disturbed that all law enforcement supervisors called in the hearings on these motions for vacation of judgment showed little or no interest in reviewing and analyzing allegations of violations of Maricopa County Jail policies written or unwritten, well established standard methods for handling persons in custody while in a law enforcement officer's care, custody and control, as well as other questionable conduct.
>
> The Court is further disturbed by the fact that at every discovery and evidentiary gathering effort undertaken by the defense teams in these matters, new revelations of benefits bestowed upon Mr. Merrill or questionable conduct by a member or members of the prosecution team are revealed and require pursuit. Minute order of October 20, 1983.

Petitioner submits that the Supreme Court of the State of Arizona has erred in failing to reverse his convictions for prosecutorial misconduct. Petitioner submits that said Court has failed to appreciate the impact on the defense case which was generated by the withholding of certain evidence. Particular reference is made to the rough notes of Officer Perez and the police reports concerning the three persons arrested by the Phoenix police on the night of the killings.

Concerning the notes of Officer Perez, petitioner concedes that these items were inculpatory and thus the analysis of United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), would seem to apply insofar as a Brady (Brady v. Maryland (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215) claim might exist. However, the Opinion of the Supreme Court of the State of Arizona fails to take into account the impact this non-disclosure had on the preparation and presentation

of the defense. A substantial portion of the defense case was predicated upon a claim of misidentification of the petitioner by the surviving victim, Mrs. Redmond. Surely this was no secret to the prosecution. Had the defense known that Officer Perez's rough notes contradicted the contents of his police report, it is fair to assume that the petitioner would have changed his defense strategy. To put it plainly, the prosecution, by withholding this evidence, led the defense to believe that a strong misidentification defense existed when, in fact, it did not. The underlying principle which the aforesaid Court overlooks in its Opinion is that any defendant is entitled to full disclosure so that he may fairly evaluate the evidence and available defenses in order to prepare his defense. The withholding of Officer Perez's notes substantially obstructed that defense function and required a change on strategy after the trial had begun. Considering the seriousness of the charges and the massive amount of information to be investigated and weighed, forcing a change of strategy in the middle of trial substantially deprived petitioner of his right to a fair trial.

With regard to the withholding of the police reports concerning the arrest of three men on the night of the killings who were initially thought to be possible suspects, petitioner submits that such Court's reliance on State v. Jessen, 130 Ariz. 1, 633 P.2d 410 (1981) is misplaced. Jessen involved a failure to disclose a variation between the statement of a witness, recorded in a police report and a statement later given by the same witness to the prosecutor. The variation was later disclosed at trial. Based on these facts, the Supreme Court of the State of Arizona held that when previously undisclosed exculpatory evidence is revealed at trial and presented to the jury, there is no Brady violation. Jessen at p. 413. In this case, the evidence which was not disclosed was substantially more than a favorable variation in the testimony of one witness. What was concealed was substantial evidence which, at least, facially suggested that persons other than petitioner and his co-defendant were responsible for

the killings. Comparing the concealed evidence in this case to that which was in issue in Jessen is to compare a gnat to an elephant. Obviously, both are animals, but the similarity ends there. This case took months to investigate and prepare and many weeks to try. Had the information been provided to the defense, there simply is no telling what could have been done with it. And that is precisely what is wrong with the aforesaid Court's analysis of this claim. Neither such Court or anyone else is able to state what could have been done with the concealed information had it been provided in a timely manner. It is impossible to assess the potential impact of this evidence since the petitioner and his counsel were never given the opportunity to investigate and further develop the information. The aforesaid Court's Opinion seems to reward the government for its own misconduct by assuming: (1) the scope and extent of the concealed evidence was only that which was revealed at trial and that no further information or evidence favorable to petitioner could be developed and (2) the use to which the concealed evidence was put at trial is the only use which could have been made of the evidence. The fact of the matter is that no one knows where or to what this concealed information could have led or what other uses could have been made of it. The reason no one knows is that the government broke the rules and failed to disclose the information. Not only is the aforesaid Court's reliance on Jessen misplaced, but its Opinion appears to be inconsistent with this Court's holdings in Brady v. Maryland, supra, and United States v. Agurs, supra. This Court's overriding concern in those cases was the defendant's right to a fair trial. One of the most basic elements of fairness in a criminal trial is that available evidence tending to show innocence, as well as that tending to show guilt, be fully aired before the jury; more particularly, it is that the State in its zeal to convict a defendant not suppress evidence that might exonerate him. See Moore v. Illinois, 408 U.S. 786, 810, 92 S.Ct. 2562, 2575, 33 L.Ed.2d 706 (1972) (opinion of Marshall, J.).

No interest of the State is served, and no duty of the prosecutor advanced, by the suppression of evidence favorable to the defendant. On the contrary, the prosecutor fulfills his most basic responsibility when he fully airs all the relevant evidence at his command. This case involve deliberate prosecutorial misconduct. There is a significant chance that the withheld evidence, developed by skilled counsel, would have induced a reasonable doubt in the minds of enough jurors to avoid a conviction had such evidence been timely disclosed. The right of the petitioner, under the Fifth, Sixth and Fourteenth Amendments, to a fair trial was violated by the deliberate prosecutorial misconduct of suppression of evidence affecting the truth-seeking process. The Superior Court of Maricopa County erred in not granting a mistrial, and the Supreme Court of the State of Arizona erred in affirming petitioner's convictions and sentences. For these reasons it is requested that this Honorable Court grant the Petition for Writ of Certiorari, reverse the convictions and sentences of the petitioner, and remand the cause for a new trial.

B.

THE ADMISSION OF THE IDENTIFICATION TESTIMONY AT PETITIONER'S TRIAL DEPRIVED HIM OF DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT.

In Foster v. California, 394 U.S. 440, 442, 89 S.Ct. 1127, 1128, 22 L.Ed.2d 402 (1969), this Court found the identification procedures to be violative of due process. There, the witness failed to identify Foster the first time he confronted him, despite a suggestive lineup. The police then arranged a showup, at which the witness could make only a tentative identification. Ultimately, at yet another confrontation, this time a lineup, the witness was able to muster a definite identification. This Court held all of the identifications inadmissible, observing that the identifications were "all but inevitable" under the circumstances. Id., at 443, 89 S.Ct., at 1129. It is the likelihood of misidentification which violates a defendant's right to due process, and it is this which was the basis of the exclusion of evidence in Foster. Like Foster there exist in the present case an intolerable risk of misidentification.

After recovering from her injuries, the surviving victim, Mrs. Redmond, was transported to Chicago for the purpose of viewing a lineup. Prior to being shown the lineups, Mrs. Redmond was told that someone had been arrested in Chicago and that she was going to look at some people. (RT of November 30, 1982 at p. 59)

Petitioner and his co-defendant were displayed to Mrs. Redmond in separate lineups. Mrs. Redmond claimed to have identified petitioner and his co-defendant after reviewing these lineups.

Prior to the trial of this matter, petitioner and his co-defendant filed motions to suppress their pretrial identification by Mrs. Redmond as unduly suggestive. The evidence adduced at the hearing on these motions and later, during

the trial, showed that Mrs. Redmond, shortly after the incident, stated that one of the negro suspects involved in the killings was light complected. (RT of December 20, 1982 at pp. 130-131) On another occasion, Mrs. Redmond stated that petitioner was lighter than most of the black people she had ever seen in her life. (RT of November 30, 1982 at p. 84)

At the hearing on petitioner's motion, evidence was adduced that petitioner was lighter than anyone else in the lineup (RT of August 27, 1982 at p. 28), was the only one in the lineup with a short sleeve shirt (in Chicago in February of 1981) (RT of August 27, 1982 at p. 50) and was the only person in the lineup with a tatoo (RT of August 27, 1982 at p. 51). Despite these facts (and despite the fact that it was clear that petitioner could have been provided with a long sleeve shirt before the lineup) (RT of August 27, 1982 at p. 104) the trial Court refused to find the pretrial identification unduly suggestive or that, under all the circumstances, the suggestive procedure gave rise to a substantial likelihood of misidentification. The Supreme Court of the State of Arizona assumed, without deciding, that the lineup procedure was unduly suggestive, but found the identification reliable under the five (5) factors stated in Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). They are: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. Id., at 199, 93 S.Ct., at 382. Petitioner here asserts that the Supreme Court of the State of Arizona erred in so finding.

First, Mrs. Redmond did not have ample opportunity to observe the intruders under conditions favoring a reliable identification. Mrs. Redmond testified that after she first encountered petitioner in the laundry room, he led her through her

house at gunpoint speaking to her several times. She indicated that she was frightened and feared for her life. While Mrs. Redmond claimed that during this period she had no difficulty seeing petitioner's face or body, and further claimed that she also got a good look at him in her well-lighted bedroom, she gave a description of one of her assailants as merely light complected. Considering the facts that Mrs. Redmond was frightened, and that she focused her attention on one of her assailants' complection, she did not have ample opportunity to observe all of her assailants under conditions favoring a reliable identification.

During the incident, Mrs. Redmond did not have a high degree of attention. The record reflects that she was very frightened and, while she paid attention to what her assailants were doing, her attention was not focused on the faces of all of her assailants.

As the Supreme Court of the State of Arizona notes in its Opinion, the accuracy of Mrs. Redmond's description was hotly contested at trial, with the defense arguing that Mrs. Redmond's first description of her assailants indicated that three black men, two of whom were masked, were the murderers. Mrs. Redmond said all three men were black and then said "no, one was white." Some accounts indicate that she stated that one or two of the assailants wore masks and other testimony in the record shows that Mrs. Redmond never mentioned masks following the crime. Her descriptions of the assailants were not particularly detailed. Petitioner submits that examination of the totality of the circumstances regarding this factor leads to the conclusion that the accuracy of the witness' prior description was minimal.

Mrs. Redmond did not display a good level of certainty at the lineup. When she first viewed the lineup containing petitioner, she did not even identify him. Instead, she left the room for a considerable period of time and then returned. Afterwards, she requested that the first lineup be reassembled, at which time she identified petitioner.

Mrs. Redmond indicated through her testimony that she had picked out petitioner in her mind during the first lineup because he was light complected, and that she wanted a second look at him to make sure of his height. When she again saw petitioner she said she was positive that he was one of the assailants. Mrs. Redmond's initial hesitancy does not demonstrate a good level of certainty.

With regard to the time between the crime and the confrontation, Mrs. Redmond's identification of petitioner came fifty-three days after the crime. Thus, there was the passage of many weeks between the crime and the confrontation. Mrs. Redmond's identification of petitioner fifty-three days after the crime was unreliable under the facts and circumstances of this case.

Petitioner submits that these indicators of Mrs. Redmond's ability to make an accurate identification are outweighed by the corrupting effect of the challenged identification itself. Petitioner further submits that under all the circumstances of this case there exist a very substantial likelihood of misidentification, and that, therefore, the Superior Court of Maricopa County erred in admitting evidence of Mrs. Redmond's pretrial identification of petitioner as well as in-court identification, and the Supreme Court of the State of Arizona erred in affirming petitioner's convictions and sentences. It is therefore requested that this Honorable Court grant the Petition for Certiorari, reverse the convictions and sentences of the petitioner, and remand the cause for further prceedings.

C.

THE REFUSAL OF THE TRIAL COURT TO PERMIT THE CROSS-EXAMINATION OF INVESTIGATOR RYAN ON HIS PENDING CONTEMPT CHARGES DEPRIVED PETITIONER OF HIS RIGHT TO CONFRONTATION IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS.

Prior to the commencement of the trial of this matter, County Attorney Investigator Dan Ryan was cited for contempt by another division of the Maricopa County Superior Court for his conduct in and prior to the trial of co-conspirator Lukazic. Prior to calling Ryan as a rebuttal witness in this case, the government attorneys sought and received an order of the trial judge that Ryan could not be cross-examined on the pending contempt citation. Thereafter, when Ryan was being questioned on direct by the government's lawyer, he was asked about the facts and circumstances which comprised the pending contempt citations against him. He denied engaging in this conduct. (RT of December 20, 1982 at pp. 27-72) Thereafter, petitioner and his co-defendant sought leave of the trial court to question Ryan concerning his pending contempt citation despite the previous order of the court. (RT of December 20, 1982 at pp. 133-135) This request was denied.

The rationale of petitioner's argument was that the government itself had made the pending contempt charge relevant and appropriate for cross-examination by asking Ryan about the substance of the pending contempt charges and giving him a chance to deny them. The defense theory was that Ryan had a compelling, obvious bias and reason for giving the answers he gave to the questions posed by the prosecutor:

> Mr. Woods: "The jury should know that if Dan answered anything but no at this point he would be admitting to the charges which are felonies against him."
> (RT of Dec. 20, 1982 at p. 135)

Petitioner respectfully submits that the refusal of the trial court to allow petitioner and his co-defendant to cross-examine Ryan on his pending contempt citation

deprived petitioner of his right to confront and cross-examine the witness against him as that right is guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States.

In Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), this Court held that the Sixth Amendment's right of an accused to confront the witnesses against him is a fundamental right and is made obligatory on the States by the Fourteenth Amendment. Confrontation means more than being allowed to confront the witness physically. "'Our cases construing the (confrontation) clause hold that a primary interest secured by it is the right of cross-examination.'" Douglas v. Alabama, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965). Moreover, a witness' bias or self-interest may be shown by proving that the witness is under indictment and that the prosecution is responsible for prosecuting that indictment. See Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

In Davis v. Alaska, supra, this Court stated:

> "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' 3A J. Wigmore, Evidence § 940, p. 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. Greene v. McElroy, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959)." Id., at 316, 94 S.Ct., at 1110.

The test for whether the trial court has abused its discretion in denying cross-examination is whether the jury is otherwise in possession of sufficient information upon which to make a discriminating appraisal of the subject matter at issue. When the refused cross-examination relates to impeachment evidence, as in this case, a court must see whether the jury had sufficient information to appraise the bias and motives of the witness. Skinner v. Cardwell, 564 F.2d 1381, 1389 (9th Cir. 1977).

The pendency of Ryan's contempt citation obviously affected the answers he gave to the prosecutor's questions in this case. The trial court's ruling that the matter was irrelevant and inadmissible effectively emasculated petitioner's right to cross-examine witness Ryan and was error. Likewise, the failure of the Supreme Court of the State of Arizona to find an unreasonable limitation of the cross-examination right was error. In its Opinion such Court indicates that it did not find an unreasonable limitation of the cross-examination right because, "(f)irst, the County Attorney prosecuting the instant case was not involved in prosecuting Mr. Ryan for contempt;" and, "(s)econd, the jury had before it ample evidence showing Mr. Ryan's bias and self-interest." (Opinion, p. 25) Petitioner submits that both of such reasons are unsupported by the record or are either inaccurate or insufficient. For these reasons it is requested that this Honorable Court grant the Petition for Writ of Certiorari, reverse the convictions and sentences of the petitioner, and remand the cause for a new trial.

D.

THE TRIAL COURT'S ADMISSION INTO EVIDENCE OF CERTAIN GRUESOME PHOTOGRAPHS OF THE VICTIMS AND THE CRIME SCENE WAS AN ABUSE OF DISCRETION AND DEPRIVED THE PETITIONER OF HIS RIGHT TO A FAIR TRIAL IN VIOLATION OF THE FOURTEENTH AMENDMENT.

In the instant case, the cause and manner of death was never at issue. Petitioner and his co-defendant stipulated to the cause of death. (RT of November 4, 1982 at p. 24) The uncontested nature of these facts is further demonstrated by the testimony of Detective Martinson describing the location and condition of the bodies. There was virtually no cross-examination of Martinson on these issues. (See RT of November 4, 8 and 9, 1982 at pp. 136 et seq.) The testimony of the medical examiner also proves the point. Cross-examination of this witness consisted of 1½ pages of reporter's transcript, a total of seven questions, none of which challenged the government's theory regarding the cause and manner of death. Nevertheless, the government insisted upon the introduction of a series of gruesome photographs showing the horrible injuries of the victims and copious amounts of blood. These exhibits were: 52, 53, 55, 57, 58, 59, 61, 64, 66, 67, 73, 76, 77, 79, 80, 81-84, 86, 88 and 89.

During the trial, petitioner objected to the admission of these pictures on the basis that they were gruesome and that the probative value was substantially outweighed by the danger of unfair prejudice. (RT of November 4, 8 and 9, 1982 at pp. 32 et seq.) A review of the photographs demonstrates the point better than any argument which could be set forth here. The photographs were both gruesome and horrible. They were also irrelevant, unnecessary and prejudical. The photographs were not used as an aid to the jury but rather for shock value.

In his brief filed before the Supreme Court of the State of Arizona, petitioner acknowledged that the admission of photographs of this type was largely a matter of discretion for the trial court and that absent a showing of an abuse of that discretion,

the ruling of the trial court should not be disturbed. Petitioner cited the case of State v. Makal, 104 Ariz. 476, 455 P.2d 450 (1969), where the Supreme Court of the State of Arizona stated:

> "Photographs may be material to establish the cause or manner of death or may have other probative value and may be admitted or excluded within the trial court's sound discretion. * * * (citation omitted) * * * Where as here there was substantially no contraversy concerning the commission of the offenses, there was no significant reason for their admission into evidence. The photographs were highly inflamatory, without any particular saving purpose, and could only have tended to prejudice the defendant in the minds of the jurors." Makal, at p. 452.

Petitioner also cited the cases of State v. Steele, 120 Ariz. 462, 586 P.2d 1274 (1978), where the Supreme Court of the State of Arizona stated it will not hesitate to reverse when it is satisfied that the sole purpose for the introduction of gruesome evidence was to prejudice the jury; and State v. Chapple, 135 Ariz. 281, 660 P.2d 1208 (1983), where such Court considered the precise issue presented here and held the admission of the photographs to be error in light of the fact that they were extremely inflammatory and did not tend to prove or disprove any issue which was actually being contested between the parties. See Chapple, at pp. 1215-1216. Here, however, such Court did not so hold. Instead, it found that their probative value outweighed their prejudicial effect, and that the trial court did not abuse its discretion in admitting the photographs. Petitioner submits that the Supreme Court of the State of Arizona erred.

Any fair-minded review of the record in this case will demonstrate that the gruesome and highly inflammatory photographs referred to above were offered for only one purpose: to prejudice the jury against petitioner and his co-defendant. They added nothing to assist the jury in resolving any issue contested by the parties. The admission of the photographs clearly constituted a gross abuse of discretion

(accord Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416, 91 S.Ct. 814, 823 (1971)(elements of "abuse of discretion" test)) and deprived petitioner of his right to a fair trial as that right is guaranteed by the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of the State of Arizona erred in finding no error in the admission of such photographs. For these reasons petitioner request that this Honorable Court grant the Petition for Writ of Certiorari, reverse his convictions and sentences, and remand the cause for a new trial.

E.

THE PROSECUTOR COMMENTED ON THE FAILURE OF PETITIONER TO TESTIFY IN VIOLATION OF HIS RIGHT TO SILENCE AS GUARANTEED TO HIM PURSUANT TO THE FIFTH AND FOURTEENTH AMENDMENTS.

During the government's final argument to the jury, prosecutor Brownlee made the following statement:

> "Mr. Woods told you in his opening statement that Cruz and Merrill tried to get Bracy and Hooper involved in the South Phoenix drug deal and Bracy and Hooper said no, take a hike. You didn't hear any evidence to that effect." (RT of Dec. 21, 1982 at p. 152, emphasis added.)

Both counsel immediately objected to this statement and moved for a mistrial. (RT of December 21, 1982 at p. 153) The prosecutor attempted to justify this comment on the basis that Hooper's lawyer (Mr. Woods) had stated in his opening statement that he would prove this. The trial judge refused to grant the mistrial and merely instructed the jury to disregard the statement. Lost in the shuffle was the fact that neither petitioner or his counsel had made this statement.

It is well settled that a prosecutor may not comment on a defendant's invocation of his right to silence in a criminal trial. Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). Such a comment violates a defendant's right to silence guaranteed to him by the Fifth and Fourteenth Amendments to the Constitution of the United States. Prosecutorial comment mandates reversal "where such comment is extensive, where an inference of guilt from silence is stressed to the jury as a basis of conviction, and where there is evidence that could have supported acquittal." Anderson v. Nelson, 390 U.S. 523, 88 S.Ct. 1133, 20 L.Ed.2d 81 (1968) (per curiam).

In the instant case, the prosecutor deliberately made reference to petitioner's silence as indicated above. The comment was not invited by either petitioner or his counsel. While the record does reflect that the statement in question was an isolated one during the course of lengthy final arguments, it is clear that the prosecutor sought through such statement to stress petitioner's silence as evidence of guilt and that such statement was not the only incident of deliberate misconduct on the part of the prosecution. Clearly, "the language used was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify." United States v. Soulard, 730 F.2d 1292, 1306 (9th Cir. 1984). Under these circumstances, the prosecutor's comment on the failure of petitioner to testify prejudiced petitioner considerably and deprived him of his right to silence as guaranteed to him by the Fifth and Fourteenth Amendments to the Constitution of the United States. The Supreme Court of the State of Arizona erred in holding that no violation occurred because "(t)he prosecutor's statement reflected the state's position that defendant failed to produce exculpatory evidence regarding a certain issue," and because "(i)t (the comment) was not phrased to call attention to defendant's own failure to testify, nor does it appear from the record that defendant was the only one who could explain or contradict the state's evidence." It is therefore requested that this Honorable Court grant the Petition for Certiorari, reverse the convictions and sentences of the petitioner, and remand the cause for further proceedings.

F.

THE PROVISIONS OF A.R.S. §13-703 VIOLATE PETITIONER'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES IN THAT IT DENIES PETITIONER THE RIGHT TO HAVE A JURY PASS ON THE FACTUAL QUESTIONS WHICH MIGHT LEAD TO THE IMPOSITION OF THE DEATH PENALTY.

The procedure set forth in the provisions of A.R.S. §13-703 for the assessment of the death penalty leaves all of the decisions upon which the imposition of the penalty may be predicated in the hands of the trial judge. Petitioner submits that this procedure denied him his right to a trial by jury in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States. In its special verdict, the trial judge found as aggravating circumstances that petitioner created a grave risk of death to Marilyn Redmond, that he committed the killings for the receipt or in the expectation of the receipt of pecuniary value and that the killings were accomplished in an especially heinous, cruel and depraved manner. Each of these factors involves a factual determination about the nature of the crime rather than a judgment concerning the nature of the petitioner or his background. Therefore, petitioner relies upon State v. Quinn, 50 Or.App. 383, 623 P.2d 630 (1981), where the Court said, in striking down the Oregon statute:

> ". . . the facts which constitute the crime are for the jury and those which characterize the defendant are for the judge." Quinn, supra, at p. 643.

For these reasons it is requested that this Honorable Court grant the Petition for Certiorari, reverse the judgment upholding the death penalty, and remand for further proceedings.

G.

THE PROVISIONS OF A.R.S. §13-703 VIOLATE PETITIONER'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES IN THAT IT GIVES THE TRIAL COURT NO GUIDANCE AS TO WHAT ARE MITIGATING FACTORS AND NO GUIDANCE AS TO THE MANNER IN WHICH AGGRAVATING FACTORS ARE TO BE WEIGHED AGAINST MITIGATING FACTORS.

The petitioner submits that the Arizona death penalty statute, A.R.S. §13-703, is unconstitutional under the Eighth and Fourteenth Amendments to the Constitution of the United States as interpreted in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), in the following respects:

1. The open-ended language of A.R.S. §13-703(G) gives the trial court no guidance as to what are mitigating factors. Under the statute anything can be a mitigating factor. A statute which leaves a judge free to regard anything as a mitigating factor necessarily leaves him free to disregard anything as a mitigating factor. The result is that the death penalty is imposed in Arizona in just as arbitrary and capricious a manner as the statute struck down in Furman v. Georgia, supra.

2. Even if the trial judge finds one or more mitigating circumstances, if he finds at least one aggravating factor he is free to impose a death penalty by simply saying the mitigating factor(s) are not ". . . sufficiently substantial to call for leniency." A.R.S. §13-703(E). The statute gives the judge no guidance in how to weigh aggravating against mitigating circumstances. The result is a totally subjective determination that one man shall live and the other shall die. A.R.S. §13-703 appears to give a judge guidance so that this decision will not be arbitrary. Upon analysis, it provides none at all.

For these reasons it is requested that this Honorable Court grant the Petition for Certiorari, reverse the death penalty of the petitioner, and remand the cause for

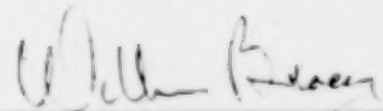
further proceedings.

VI.

CONCLUSION

For the reasons stated above, petitioner respectfully requests that this Honorable Court grant this Petition for Writ of Certiorari to the Supreme Court of the State of Arizona.

Respectfully submitted,



Petitioner, pro se

WILLIAM BRACY
Register Number C-01532
Box 99
Pontiac, Illinois 61764

DATED: October 21, 1985

NO. 85-5776

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

WILLIAM BRACY,	)	
	)	
Petitioner,	)	On Writ of Certiorari to the Supreme
	)	
-vs-	)	Court of the State of Arizona.
	)	
STATE OF ARIZONA,	)	
	)	
Respondent.	)	

APPENDIX

WILLIAM BRACY
Register Number C-01532
Box 99
Pontiac, Illinois 61764

Petitioner, pro se

TABLE OF CONTENTS

Set June 23 as date for filing motion for reconsideration

IN THE SUPREME COURT OF THE STATE OF ARIZONA
En Banc

STATE OF ARIZONA,

Appellee,

vs.

WILLIAM BRACY,

Appellant,

Supreme Court
No. 5809

Maricopa County
Superior Court
No. CR-121686

Appeal from the Superior Court of Maricopa County

The Honorable Cecil B. Patterson, Jr. Judge

Affirmed

Robert K. Corbin — Phoenix
Attorney General

William J. Schafer III — Phoenix
Chief Counsel
Criminal Division

Gerald R. Grant — Phoenix
Assistant Attorney General

Attorneys for Appellee

J. Douglas McVay — Phoenix

Attorney for Appellant

GORDON, Vice Chief Justice:

On December 24, 1982 a jury found defendant, William Bracy,[1] guilty of one count of conspiracy to commit first degree murder, two counts of first degree murder, one count of attempted first degree murder, three counts of kidnapping, three counts of armed robbery, and one count of first degree burglary.

Defendant was subsequently sentenced to death for each count of first degree murder, to life imprisonment for conspiracy to commit first degree murder, and to approximately 140 years for the other crimes. This Court has jurisdiction under Ariz. Const. art. 6, § 5(3) and A.R.S. § 13-4031. We affirm the convictions and sentences.

The facts, viewed in the light most favorable to upholding the verdict, show that Pat Redmond and Ron Lukezic were partners in a successful printing business called Graphic Dimensions. In the summer of 1980, Graphic Dimensions was presented with the possibility of some lucrative printing contracts with certain hotels in Las Vegas. These deals fell through, however, when Pat

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[1] In State v. McCall, 139 Ariz. 147, 677 P.2d 920 (1984), Mr. Bracy's last name was spelled "Bracey," and his name appears that way on some Illinois records. In the instant case, however, his name appears as "Bracy" on most records, and we will use this spelling here.

Redmond and perhaps Ron Lukezic vetoed the idea.

In September of 1980, Robert Cruz asked Arnold Merrill if he would kill Pat Redmond for $10,000. Merrill declined. Cruz wanted Redmond killed in order to get Redmond's interest in Graphic Dimensions. Cruz ultimately planned to have Ron Lukezic killed as well and take complete control of Graphic Dimensions. In early December of 1980, Cruz and Merrill went to the Phoenix Airport and picked up defendant and Murray Hooper who arrived on a flight from Chicago. Cruz and Merrill then took defendant and Hooper to a hotel in Scottsdale, and Cruz gave defendant a key to one of the rooms.

Defendant and Hooper stayed in the Valley for several days, during which time Merrill drove the two men to various locations. On one occasion, Merrill took defendant and Hooper to see Cruz, and Cruz gave defendant a stack of $100 bills, some of which defendant gave to Hooper. That same day Merrill, at Cruz's direction, took defendant and Hooper to a gun store owned by Merrill's brother, Ray Kleinfeld. Hooper picked out a large knife and defendant told Kleinfeld to put it on Cruz's account. Kleinfeld gave defendant a paper bag containing three pistols. Defendant, Hooper, and Merrill subsequently drove to the desert, where defendant took target practice with the guns while Hooper rested in the back of Merrill's car. Defendant and Hooper later moved from the hotel into Merrill's house, where they met Ed McCall.

A few days later, defendant, Hooper, and Merrill followed Pat Redmond's car as Redmond left a bar. When they neared Redmond's car, Hooper attempted to shoot Redmond. The attempt failed, however, when Merrill, who was driving, intentionally swerved the car. Cruz, defendant, and Hooper were upset at Merrill for his actions. After the failed attempt, defendant and Hooper moved out of Merrill's home and into the apartment of Valinda Lee Harper and Nina Marie Louie, two women Merrill had introduced to defendant and Hooper. On December 8, 1980, McCall told Merrill he was "joining up" with defendant and Hooper. Defendant and Hooper returned to Chicago shortly thereafter.

Defendant and Hooper returned to Phoenix on December 30, 1980. On the evening of December 31, 1980 defendant, Hooper, and McCall went to the Redmond home and forced their way in at gunpoint. Pat Redmond, his wife Marilyn, and Marilyn Redmond's mother, Helen Phelps, were present. Defendant, Hooper, and McCall eventually herded the Redmonds and Mrs. Phelps into the master bedroom where they bound, gagged, and robbed them. After forcing the Redmonds and Mrs. Phelps to lie face down on the bed, one or all of the intruders shot each victim in the head. One of the intruders also slashed Pat Redmond's throat. Pat Redmond and Mrs. Phelps died from their wounds, but Marilyn Redmond lived.

Defendant was tried with Hooper. Marilyn Redmond provided the most damning evidence against defendant, stating that he and Hooper, along with McCall, forcibly entered her home and

committed the murders. Arnold Merrill and several other witnesses tied defendant and Hooper to the conspiracy to kill Pat Redmond. Although admitting they were in Phoenix in early December, the defendant and Hooper maintained they had no part in the plot to kill Pat Redmond. Rather, they contended that Arnold Merrill and other local criminals, as part of a robbery ring, framed both defendant and Hooper for the murders which probably resulted from a robbery attempt. Defendant and Hooper also maintained that Mrs. Redmond misidentified them and that they were in Chicago on New Year's Eve of 1980.

Defendant raises a number of issues.

I. PROSECUTORIAL MISCONDUCT

Defendant alleges that prosecutors Joseph L. Brownlee and Michael D. Jones, as well as their chief investigator Dan Ryan,[2] engaged in continuous misconduct denying defendant his right to a fair trial. The alleged instances of misconduct involve prosecutorial nondisclosure of evidence and misconduct exclusive of nondisclosure of evidence.

A. Misconduct Exclusive of Failure to Disclose Evidence

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[2] The trial judge evidently considered Dan Ryan as part of the prosecution team, imputing his misconduct to the prosecution. We agree. Mr. Ryan was employed by the County Attorney and he answered directly to Mr. Brownlee. Mr. Brownlee was responsible for his actions.

Having reviewed the alleged instances of prosecutorial misconduct, we discuss the following, examining whether misconduct occurred.

First, in opening statement, the prosecutor stated that Nina Marie Louie made positive pretrial identifications of both defendant and Hooper. The trial judge, however, had not yet decided whether those pretrial identifications were admissible, and he later ruled them inadmissible. Though allowing Louie to make in-court identifications of both defendant and Hooper, the trial court instructed the jurors to disregard the prosecutor's remarks concerning the pretrial identifications. As the trial court had not yet decided whether the pretrial identifications were admissible, the prosecutor's statements were baseless and improper.

Defendant next alleges misconduct in prosecutor Joseph L. Brownlee's appearance in the November 1982 issue of Phoenix Magazine.[3] On September 28, 1982 Mr. Brownlee and all other lawyers in this case agreed with the trial judge not to contact the media. Prior to this agreement, Brownlee voluntarily interviewed with a Phoenix Magazine reporter who desired a story on Brownlee and the Redmond murders. Brownlee discussed, among other things, where he was and what he was doing New Year's Eve

[3] The trial in this matter began in late October of 1982.

of 1980 when he heard about the murders, how he then spent the entire night and part of the next day investigating the murders, how inspirational Mrs. Redmond had been, his philosophy of prosecuting, and his favorite past case. After the September 28th agreement, Brownlee posed for photos to accompany the article.

Even assuming the parties had not agreed to contact the media, Mr. Brownlee's actions were improper as a transgression of rules relating to trial publicity. See Rule 29(a), DR 7-107, Ariz. R. S. Ct. in effect at the time of the trial. In addition, by posing for photos to accompany the article after having agreed not to contact the media, Mr. Brownlee blatantly violated an agreement with the trial court. See DR 1-102(A)(4),(5); DR 7-106(B)(6). Mr. Brownlee's behavior was improper.

Defendant next alleges that county attorney investigator Dan Ryan allowed Arnold Merrill to go free of custody in violation of Maricopa County Jail regulations to visit his wife for sexual relations. The record at least reveals that Dan Ryan took Arnold Merrill out of jail to privately visit his wife. This action was certainly improper.

1) Prejudice resulting from misconduct

We now examine the prejudice resulting from the above three instances of misconduct. We will reverse a conviction only where the defendant has been denied a fair trial as a result of

prosecutorial misconduct. State v. Hallman, 137 Ariz. 31, 668 P.2d 874 (1983); State v. Moore, 108 Ariz. 215, 495 P.2d 445 (1972). A defendant is denied a fair trial because of prosecutorial misconduct if there exists a reasonable likelihood that the misconduct could have affected the jury's verdict. See State v. Tuzon, 118 Ariz. 205, 575 P.2d 1231 (1978). Whether a reasonable likelihood exists that the misconduct could have affected the jury's verdict is left to the sound discretion of the trial court. State v. Gonzales, 105 Ariz. 434, 466 P.2d 388 (1970).[4]

We do not believe a reasonable likelihood exists that the misconduct affected the verdict. No prejudice resulted to defendant from Mr. Brownlee's improper opening statements concerning pretrial identification. The trial court prohibited Nina Marie Louie from testifying regarding the pretrial identifications. Immediately after allowing Louie to identify defendant in court, the trial court instructed the jury to disregard the prosecutor's statement regarding the pretrial identification. The trial court's curative instruction, therefore, nullified any prejudice defendant suffered from the prosecutor's improper statement. See State v. Means, 115 Ariz. 502, 566 P.2d 303 (1977) (in light of trial court's curative

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[4] The trial court denied numerous defense motions for mistrial based upon prosecutorial misconduct.

instruction, trial court did not abuse discretion in refusing to order new trial because of prosecutor's improper closing argument).

Though we are disturbed by Mr. Brownlee's misconduct regarding trial publicity, we cannot say any prejudice resulted. After the article surfaced, the trial judge questioned all the jurors, determining that none of them had read it. In addition, the trial court ordered the jurors not to read the issue of the magazine in which the article appeared.

As to Dan Ryan's letting Arnold Merrill out of jail to privately visit his wife, we cannot say it caused prejudice to defendant. The defense brought the information to the jury's attention for the jury to use in judging Merrill's and Ryan's credibility. We find no abuse of discretion.

B. Prosecutorial Nondisclosure of Evidence

1.) Defendant alleges that numerous instances of prosecutorial nondisclosure of evidence warrant a new trial. Such nondisclosure concerns the rule of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and Rule 15.1, Ariz. R. Crim. P. 17 A.R.S., the codification of Brady.

1) Alleged Instances of Nondisclosure

Defendant alleges the following instances of prosecutorial nondisclosure of evidence: the untimely disclosure of a police report containing "horribly incriminating" statements attributed to defendant; the failure to disclose, until trial, Officer

Perez's handwritten notes that were consistent with Mrs. Redmond's testimony regarding the description of the three assailants even though his police report contradicted her testimony; the suppression, until trial, of photographs of three black men arrested New Year's Eve of 1980 who were later released; the suppression, until trial, of police reports regarding the arrests of the three men on the 31st; and the failure to disclose benefits totaling $878.00 the prosecution gave to Nina Marie Louie in exchange for her testimony.

The next instance of prosecution suppression of evidence first came to light after trial. Both defendants moved to vacate judgment based on this evidence, and the trial court held hearings on this motion as a result of which the court found the following items had never been disclosed to defendant:

1) Prior to trial, Dan Ryan, county attorney investigator, made car payments for Arnold Merrill's wife, Cathy Merrill, totaling over $800.00 for which Ryan received only partial reimbursement;

2) Mrs. Merrill also received approximately $3,000 from the Maricopa County Attorney's Protected Witness Program;

3) Arnold Merrill made approximately twenty-two long distance phone calls from the county attorney's office, some of which were with Dan Ryan's knowledge, others of which Merrill made while left unattended in Ryan's custody, and none of which he paid for.

Although finding all of the above items a direct and

significant benefit to the Merrills, the trial court refused to vacate judgment because independent reliable evidence tied defendant to the conspiracy and to the murders and because the undisclosed evidence was cumulative.

1) Propriety of New Trial Under Brady

The United States Constitution requires the prosecution to disclose to a defendant information that would tend to absolve the defendant of guilt or mitigate his punishment. Brady v. Maryland, supra. This disclosure requirement exists regardless of the good faith or bad faith of the prosecution. Id; State v. Lukezic, 143 Ariz. 60, 691 P.2d 1088 (1984).

As to five of the above instances of nondisclosure, we find no Brady violations. The police report containing "horribly incriminating information" was excluded from trial, and the witness through which the evidence was to be presented never testified at trial. Failure to disclose inculpatory evidence is not a Brady violation. [See United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); Brady v. Maryland, supra.] In addition, as the evidence was never presented at trial, defendant could not have suffered any prejudice. The same rule applies to Officer Perez's notes, which were inculpatory in that they were consistent with Mrs. Redmond's trial testimony. See, United States v. Agurs, supra; Brady v. Maryland, supra.

Regarding the photographs of the three suspects arrested the evening of the murders, defense counsel objected to their admission, and the trial court excluded the photographs. Thus, either these photographs were not exculpatory or defense counsel did not want them in evidence for some other reason. As the trial court sustained the defense objection to admission of the photographs and ordered the jury to disregard any mention of them, defendant did not suffer prejudice from the nondisclosure of this evidence.

Regarding the police report concerning the three persons arrested New Year's Eve and the agreement with Nina Marie Louie, though all these items were exculpatory, this information came to light during trial and defendant made use of it. When previously undisclosed exculpatory information is revealed at the trial and presented to the jury, there is no Brady violation. State v. Jessen, 130 Ariz. 1, 633 P.2d 410 (1981).

As to the benefits Arnold Merrill received, we find that they were exculpatory in nature and were never disclosed to defendant. Having determined that the prosecution suppressed exculpatory evidence, we must next determine whether a new trial is warranted. The prosecution's failure to disclose exculpatory evidence to a defendant will result in a new trial when the suppressed evidence is material. United State v. Agurs, supra, Brady v. Maryland, supra. Absent an abuse of discretion, however, we will not disturb the trial court's denial of a new trial.

State v. Fisher, 141 Ariz. 227, 686 P.2d 750 (1984).

We employ a sliding scale analysis in determining what level of materiality must be proven to establish that a Brady violation requires a new trial. See United States v. Agurs, supra; Talamante v. Romero, 620 F.2d 784, (10th Cir. 1980), cert. denied, 449 U.S. 877, 101 S.Ct. 223, 66 L.Ed.2d 99; State v. Lukezic, supra. In Agurs, the United States Supreme Court announced three categories of undisclosed evidence requiring three different levels of materiality: first, in those cases in which the prosecution has knowingly used perjured testimony, the conviction must be set aside if there exists a reasonable likelihood that the false testimony could have affected the jury's verdict; second, where a pretrial request has been made for specific evidence, the judgment must be vacated if the suppressed evidence might have affected the outcome of the trial; and third, where there has been a general request for Brady material or no request at all, the test of materiality is whether "the omitted evidence creates a reasonable doubt [as to the defendant's guilt] that did not otherwise exist." United States v. Agurs, 427 U.S. at 112, 96 S.Ct. at 2402, 49 L.Ed.2d at 355; Talamante v. Romero, supra; State v. Lukezic, supra.

As there were specific defense requests for the undisclosed information concerning Arnold Merrill, the evidence fell under the second Agurs category. The defense filed a detailed discovery request demanding discovery of any benefits received by state

witnesses in exchange for their testimony. As the undisclosed evidence in the instant case fits under the second Agurs category, the test for materiality is whether the suppressed evidence might have affected the outcome of the trial. United States v. Agurs, supra; Talamante v. Romero, supra; State v. Lukezic, supra; see also 2 W. LaFave & J. Israel, Criminal Procedure § 19.5 (1984).

After carefully reviewing the record in the instant case, we find the suppressed evidence regarding benefits to Arnold and Cathy Merrill does not reach the level of materiality required by Agurs.

We so hold for two reasons. First, we find the undisclosed evidence merely cumulative. See State v. Maddasion, 130 Ariz. 306, 636 P.2d 84 (1981). The defense possessed and used a wealth of impeaching evidence against Arnold Merrill. Such evidence included Merrill's plea bargain with the state; his extensive drug use; his past participation in arson, burglary, kidnapping, and robbery; his past lies to police officers; and his private out-of-jail visit with his wife while being incarcerated for first degree murder. Though we find at least two of the undisclosed benefits somewhat unusual and improper, they do not approach the degree of seriousness of the undisclosed benefits in State v. Lukezic, supra. Thus, in view of the great wealth of impeaching evidence against Arnold Merrill showing both bad character and bias, we do not believe the disclosure of benefits

equaling several thousand dollars would have had any effect upon the outcome of the trial.

Second and more importantly, the strong eyewitness testimony of Mrs. Redmond in combination with independent evidence of defendant's participation in the conspiracy is more than sufficient to uphold the convictions. Mrs. Redmond testified that defendant, Hooper, and McCall entered her home at gunpoint and killed her husband and mother. This evidence was particularly strong because Mrs. Redmond had ample opportunity to view all three men in her home. In addition, evidence apart from that presented through Merrill showed defendant's presence in Phoenix in early and late December, his connection to Robert Cruz, and his participation in Cruz's conspiracy to kill Pat Redmond.

Unlike State v. Lukezic, supra,[5] therefore, Arnold Merrill's testimony in the instant case was merely corroborative and not pivotal. Furthermore, the undisclosed information impeaching him and Dan Ryan had no effect upon the key testimony of Marilyn Redmond. Finally, unlike Lukezic, falsifications of George Campagnoni's probation report were disclosed in the instant case, thus allowing the jury to fully judge his credibility. Campagnoni along with several other witnesses, exclusive of

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[5] In State v. Joyce Lukezic, supra, the defendant was accused of participating in the conspiracy to kill Patrick Redmond. No direct evidence linked defendant to the crime. Rather, numerous witnesses, most importantly Arnold Merrill and George Campagnoni, tied Lukezic to the conspiracy through hearsay evidence.

Arnold Merrill, provided important testimony linking defendant to the conspiracy. Thus, we do not believe that three additional pieces of impeaching information regarding Arnold Merrill might have affected the jury's belief in Mrs. Redmond and the other evidence. Nor would it have had any effect on whatever opinion the jury had of Merrill's credibility. See also Schmanski v. State, 466 N.E.2d 14 (Ind. 1984). We find no abuse of discretion.

2) Propriety of a New Trial Under the Arizona Discovery Rules

a) Whether a Violation of Arizona Discovery Rules Occurred

Rule 15.1, Ariz. R. Crim. P., 17 A.R.S., requires the prosecution to supply the defense a wide range of discovery material. We believe all of the above discussed non-disclosed evidence should have been made available to defendant. See Rule 15.1(a)(1) (relevant written or recorded statements of witnesses); (a)(2) (all statements of defendant and any person who will be tried with him); (a)(4) (photographs which prosecutor will use at trial); (a)(7) (all material which tends to reduce or negate defendant's guilt or punishment).

b) Prejudice under the Arizona Discovery Rules

As with Brady violations, not every Rule 15.1 violation will cause a reversal. Imposition of sanctions under Rule 15.7 is within the sound discretion of the trial court. State v. Stewart, 139 Ariz. 50, 676 P.2d 1108 (1984). The trial court's choice of a sanction or no sanction will not be reversed on appeal absent a showing of prejudice. State v. Jessen, supra.

We find the trial court did not abuse its discretion and that defendant was not prejudiced by the prosecution's violations of Rule 15.1. As to the police report containing incriminating statements attributed to defendant, it was excluded from trial. Regarding the photographs of the three persons arrested New Year's Eve, the trial judge excluded them from evidence and ordered the jury to disregard any mention of them. Concerning Nina Marie Louie's agreement with the prosecution, both defense lawyers made use of this information as it was exculpatory. The same is true for the police reports detailing the arrests of the three persons the evening of the murder.

As to the more inculpatory evidence contained in Officer Perez' notes, the trial court ordered the prosecution to immediately furnish the defense with copies of the notes, thus allowing defendant to cross-examine Officer Perez regarding the conflict between his notes and his police report. Second, though the prosecution had previously failed to supply defendant with the notes, the existence and contents of the notes were revealed in the Cruz-McCall trial, the transcript of which defendant possessed. Thus, the substance of the notes was disclosed to defendant.

Finally, for the same reasons stated in our Brady analysis, we do not think the trial court abused its discretion by refusing to vacate judgment under the Arizona Rules of Criminal Procedure because of the undisclosed benefits to Arnold Merrill.

Though we find a new trial is unwarranted in the instant case, we wish to express our dissatisfaction with the conduct of the prosecution. In ruling on defendant's motion to vacate judgment, the trial judge made the following observations:

> "The Court further determines that a cavalier, almost holier-than-thou attitude existed on the part of some of the prosecution team as evidenced by the overreaching, "I didn't think it mattered" blase at times, disinterested, its-none-of-your-business attitudes taken at various points during these entire proceedings.
>
> "These attitudes hampered the smooth processing of these matters during all stages and at all times caused unnecessary antagonisms between the prosecution and defense teams.
>
> * * *
>
> "The Court is further disturbed by the fact that at every discovery and evidentiary gathering effort undertaken by the defense teams in these matters, new revelations of benefits bestowed upon Mr. Merrill or questionable conduct by a member or members of the prosecution team are revealed and require pursuit."

With their staggering caseload, the last thing courts need is prosecutorial conduct that causes cases to be extended to accommodate hearings that are not only unnecessary, but are distracting and expensive. We share the trial court's displeasure at the prosecution's disclosure policies in this case.

II PRETRIAL IDENTIFICATION

Defendant next contends that the trial court erred in finding that the pretrial identification procedure in which Marilyn Redmond identified defendant was not unduly suggestive. The fairness and reliability of a challenged identification are preliminary matters for the trial court, whose findings will not be overturned on appeal absent a showing of clear and manifest error. State v. Schilleman, 125 Ariz. 294, 609 P.2d 564 (1980); State v. McGill, 117 Ariz. 329, 580 P.2d 1183 (1978);

Criminal defendants have a due process right to a fair identification procedure. State v. Myers, 117 Ariz. 79, 570 P.2d 1252 (1977); State v. Nieto, 118 Ariz. 603, 578 P.2d 1032 (App. 1978). Reliability is the key to determining the admissibility of identification testimony. Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); State v. McCall, 139 Ariz. 147, 677 P.2d 920, cert. denied, ___ U.S. ___, 104 S.Ct. 2670, 81 L.Ed.2d 375 (1983). State v. Nieto, supra. Thus, even if a pretrial identification is unduly suggestive, it is nonetheless admissible if the witness' identification is reliable. Manson v. Brathwaite, supra. State v. McCall, supra. Reliability is determined by considering the factors set out in Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

Assuming, without deciding, that the lineup procedure was

unduly suggestive, we find the identification reliable under the five Biggers factors.[6] First, Mrs. Redmond had ample opportunity to observe defendant at the time of the crime. After she first encountered defendant in the well-lighted laundry room, defendant led Mrs. Redmond through her house at gunpoint speaking to her several times. During this time Mrs. Redmond had no difficulty seeing defendant's face or body, and she also got a good look at him in her well-lighted bedroom.

During her encounter with defendant, Mrs. Redmond had a high level of attention. Though she was frightened to a certain degree, Mrs. Redmond stated that she was paying attention to the faces of all three intruders in the house. She was not just a casual observer of defendant, but rather her attention was focused on the suspect. See State v. Ware, 113 Ariz. 337, 554 P.2d 1264 (1976).

The accuracy of Mrs. Redmond's description was hotly

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6 We restated those five factors in State v. McCall, supra:

(1) the opportunity of the witness to view the criminal at the time of the crime,

(2) the witness' degree of attention,

(3) the accuracy of the witness' prior description of the criminal,

(4) the level of certainty demonstrated by the witness at the confrontation, and

(5) the length of time between the crime and the confrontation.

contested at trial, with the defense arguing that Mrs. Redmond's first descriptions of her assailants indicated that three black men, two of whom were masked, were the murderers. Regarding the reference to three black males, we believe the evidence shows that, at the scene, Mrs. Redmond initially said all three men were black, but that she corrected herself, saying, "no, one was white." The record supports the inference that this discrepancy was caused by difficulties Mrs. Redmond had in communicating immediately following the gunshot wound to her head.

Furthermore, though some accounts indicate that Mrs. Redmond initially stated that one or two of the assailants wore masks, other testimony shows that Mrs. Redmond never mentioned masks following the crime. Mrs. Redmond herself never recalled mentioning masks, and her testimony indicated that none of the intruders wore masks. Her other initial descriptions of the two black men were not particularly detailed. Examining the totality of the circumstances regarding this factor, we do not find the discrepancies in the descriptions to be per se unreliable. See State v. McCall, supra.

Mrs. Redmond displayed a good level of certainty at the lineup. When she first viewed the lineup containing defendant, she did not immediately identify him. Rather, she left the room for a period of time and later returned. She then identified Hooper in a different lineup. She then requested that the first lineup be reassembled, at which time she quickly identified

defendant. Mrs. Redmond testified that she had picked out defendant in her mind during the first lineup but that she wanted to verify his height. When she again saw him she said she was positive that defendant was one of the assailants. Thus, despite her initial hesitancy, we find Mrs. Redmond's level of certainty more indicative of reliability than not.

Mrs. Redmond's identification of defendant came fifty-three days after the crime. Whether the length of time between the crime and the pretrial identification is too long depends upon the facts of each case; there is no per se rule. See State v. Strickland, 113 Ariz. 445, 556 P.2d 320 (1976) (ten days too long where witness saw attacker for very brief moment and at a point in time where she had no discernible interest in remembering what perpetrator looked like); State v. McCall, supra (fourteen days not too long where victim had ample opportunity to observe attacker at time of crime and where victim gave detailed description of attacker). In the instant case, in light of Mrs. Redmond's ample opportunity to observe defendant at the time of the crime, her high level of attention at the time of the crime, and her good level of certainty at the lineup, Mrs. Redmond's identification of defendant fifty-three days after the crime was not unreliable.

Based upon the foregoing factors, we find no clear and manifest error in admitting evidence of Mrs. Redmond's pretrial identification of defendant.

III. SHACKLING OF DEFENDANT

Prior to jury selection, the trial judge ordered that defendant wear leg, ankle, and waist restraints so long as his arms were not confined in front of the jury. Fearing the jury would see the shackles, defendant chose to waive his presence during voir dire. He maintains the trial court's actions denied him his right to be present under Ariz. Const. art. 2, § 24.

Whether a defendant will be shackled is within the sound discretion of the trial court. State v. Stewart, 139 Ariz. 50, 676 P.2d 1108 (1984); State v. Reid, 114 Ariz. 16, 559 P.2d 136 (1976), cert. denied, 431 U.S. 921, 97 S.Ct. 2191, 53 L.Ed.2d 234 (1977). Further, when a defendant objects to being shackled during trial, there must be support in the record for the trial court's decision. State v. Stewart, supra.

The record revealed that defendant had a long history of violent crime, at least one escape conviction, and was under three death sentences in Illinois arising from a triple first degree murder. Factors a trial court may consider in shackling a defendant include past felony convictions for crimes of violence as well as prior escapes. State v. Stewart, supra; State v. Johnson, 122 Ariz. 260, 594 P.2d 514 (1979).

Here, the trial court took extensive precautions to assure

that defendant's restraints would not be visible to the jury. See State v. McMurtrey, 136 Ariz. 93, 664 P.2d 637, cert. denied, ___ U.S. ___, 104 S.Ct. 180, 78 L.Ed.2d 161 (1983) (appellate court will not find error on ground that defendant shackled unless it is shown jury saw shackles). In view of defendant's background, we do not think the trial court abused its discretion in ordering defendant to wear restraints the jury could not see. Thus, as defendant was properly restrained, he was not denied his right to be present when he voluntarily chose to be absent during voir dire.

IV. LIMITATION OF CROSS-EXAMINATION

Defendant next argues that the trial court committed reversible error by limiting defendant's cross-examination of investigator Dan Ryan.

Mr. Ryan's investigatory techniques concerning the Redmond murders resulted in a contempt of court citation in the State v. Joyce Lukezic trial.[7] During the instant case, the defense brought to light many of the allegations of wrongdoing by Mr. Ryan. In reaction, the prosecution called Mr. Ryan as a rebuttal witness, and Mr. Ryan then denied any wrongdoing. Though allowing cross-examination about the factual basis supporting the contempt

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[7] He was later acquitted of this charge.

charge, the court prohibited the defense from mentioning the contempt charge. Defendant submits that the trial court's action denied him his right to confront and cross examine witnesses guaranteed him by the sixth amendment to the United States Constitution and by art. 2, § 24 of the Arizona Constitution.

Defendants have a sixth amendment right to confront and cross-examine witnesses. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); State v. Dunlap, 125 Ariz. 104, 608 P.2d 41 (1980). Furthermore, a witness' bias or self-interest may be shown by proving that the witness is under indictment and that the prosecution is responsible for prosecuting that indictment. See Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); McCormick on Evidence, § 40, at 87 (E. Cleary 3rd Ed. 1984). We allow a broad scope of cross-examination, the unreasonable limitation of which will normally result in a reversal. State v. Dunlap, supra.

In the instant case we do not find an unreasonable limitation of the cross-examination right. First, the County Attorney prosecuting the instant case was not involved in prosecuting Mr. Ryan for contempt. Rather, a special, independent prosecutor had responsibility for prosecuting Mr. Ryan. Thus, the pending indictment would not have indicated that Mr. Ryan's testimony was colored by any hope of lenient treatment from the County Attorney. Second, the jury had before it ample evidence showing Mr. Ryan's bias and self-interest. Mr. Ryan was the

prosecution's chief investigator answering directly to Mr. Brownlee, and the alleged instances of misconduct were serious. The jury could understand that he had bias and motives for testifying as he did. See Skinner v. Cardwell, 564 F.2d 1381, 1389 (9th Cir. 1977) (test of reasonable limit on cross-examination is whether jury is otherwise in possession of sufficient information to assess the bias and motives of the witness). See also United States v. Kelly, 545 F.2d 619, (8th Cir. 1976), cert. denied, 430 U.S. 933, 97 S.Ct. 1555, 51 L.Ed.2d 777 (1977); United States v. Turcotte, 515 F.2d 145 (2nd Cir. 1975), cert. denied, 423 U.S. 1032, 96 S.Ct. 564, 46 L.Ed.2d 406 (1975).

V. INFLAMMATORY PHOTOGRAPHS

Defendant next argues that the trial court committed reversible error in admitting inflammatory photographs because their prejudicial effect outweighed their probative value.

Inflammatory photographs may be admitted if they are relevant and if their probative value outweighs the danger of unfair prejudice attendant to their admission. State v. McCall, supra; State v. Chapple, 135 Ariz. 281, 660 P.2d 1208 (1983). The decision to admit such photographs is within the sound discretion of the trial court, whose decision will not be disturbed on

appeal absent an abuse of that discretion. State v. McCall, supra; State v. Clark, 126 Ariz. 428, 616 P.2d 888, cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980).

In making its decision, the trial court must look to the purpose of the offer. State v. Routhier, 137 Ariz. 90, 669 P.2d 68 (1983), cert. denied, ___ U.S. ___, 104 S.Ct. 985, 79 L.Ed.2d 221 (1984); State v. Chapple, supra. A trial court may admit photographs to prove the corpus delicti, to identify the victim, to show the nature and location of the fatal injury, to help determine the degree or atrociousness of the crime, to corroborate state witnesses, to illustrate or explain testimony, and to corroborate the state's theory of how and why the murder was committed. State v. Chapple, supra; State v. Thomas, 110 Ariz. 120, 515 P.2d 865 (1973). The purpose for the photograph's admission, however, must be an expressly or impliedly contested issue. State v. Chapple, supra. We find no abuse of discretion in the instant case.

In State v. McCall, supra, we considered seven of the same photographs admitted in the instant case. These photographs show Mrs. Phelps' wounds and Mr. Redmond's wounds. Four of the autopsy photographs were inflammatory. We, however, found that their probative value outweighed their prejudicial effect. Concerning two other autopsy photographs, we found them cumulative but not inflammatory and, therefore, not prejudicial. As to the seventh photograph depicting Patrick Redmond's body

lying on the bedroom floor of his home, we found it inflammatory. We held, however, that it was relevant and that its probative value outweighed its prejudicial effect. The issues relating to these seven photographs are the same in the instant case as in McCall. Thus, for the reasons stated in McCall, the trial court in the instant case did not abuse its discretion in admitting the photographs.

Defendant additionally objected to the admission of seventeen other photographs, only four of which are inflammatory and demand discussion. These are detailed depictions of the victims at the murder scene. The first is a closeup of Mrs. Phelps showing the bullet wound in her right cheek. It is not extremely bloody but is somewhat inflammatory. The next photograph is a detail of Mrs. Phelps' hands bound behind her back. Some blood smears are visible and the photograph is slightly gruesome. The next is a full view of the bedroom with Mrs. Phelps' body upon the bed and Mr. Redmond's on the floor. Though neither body appears in great detail, a large amount of blood appears on the bed. The photograph is inflammatory. The last photograph is a closeup of Mr. Redmond's face and chest. The bullet wound above his ear and his cut throat are clearly visible, a sock is stuffed in his mouth, and a great amount of blood covers his face and saturates his shirt. This photograph is clearly inflammatory.

Though the above four photographs are inflammatory to varying degrees, we hold that the trial court did not abuse its

discretion in admitting them. First, these photographs gave the jury a complete view of the murder scene. By seeing closeups of faces, tied hands, and the gagged mouth in combination with photographs showing the location of the bodies, the jury could gain a full understanding of the murder scene, the identity of the victims, and how the murders were committed. These photographs alleviated the need for the jury to speculate as to these matters. See State v. McCall, supra.

Second, the photographs supported the state's theory of the case. The state alleged that these were premeditated, intentional, gangland-style contract killings. Though the less gruesome autopsy photographs tended to support this theory, State v. McCall, supra, the at-the-scene photographs provided the most convincing evidence of that theory. These photographs showed the binding, gagging, and the systematic method of killing, while the autopsy photographs show only the method of killing.

Finally, though defendant and Hooper offered to stipulate as to the identity of the victims and to the time, mode, manner, and cause of their deaths, such an offer of stipulation does not make photographs inadmissible. An expressly and impliedly contested issue at trial was whether the murders were premeditated contract killings or whether they were murders committed by local criminals during a robbery attempt. The photographs support the contract murder theory. Further, despite defendant's stipulation, we cannot compel the state "to try its

case in a sterile setting." State v. Chapple, 135 Ariz. at 289-90, 660 P.2d at 1216. Some of these photographs were gruesome, but the jury may see such photographs if they are relevant and more probative than prejudicial. We find no error.

VI. PROSECUTORIAL COMMENTS IN CLOSING ARGUMENT

Defendant next argues that the prosecutor's final rebuttal argument contained impermissible references to defendant's failure to testify. The prosecutor stated:

> "[MR. BROWNLEE:] Mr. Woods told you in his opening statement that Cruz and Merrill tried to get Bracy and Hooper involved in the South Phoenix drug deal and Bracy and Hooper said no, take a hike. You didn't hear any evidence to that effect."

The fifth amendment's prohibition against self-incrimination prohibits prosecution arguments that a defendant's failure to testify supports an unfavorable inference against him. Lakeside v. Oregon, 435 U.S. 333, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978); Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); State v. Fuller, ___ Ariz. ___, 694 P.2d 1185 (1985). Such conduct also violates a state statute, A.R.S. § 13-117(B), which has been raised to the level of a constitutional guarantee. State v. Fuller, supra.

Thus, under both Arizona and Federal law, an impermissible comment upon a defendant's invocation of his right not to testify occurs when "the language used was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify." United States v. Soulard, 730 F.2d 1292, 1306 (9th Cir. 1984); State v. Fuller, supra. The prosecutor, however, may properly comment upon the defendant's failure to present exculpatory evidence except when (1) the comment is phrased to call attention to the defendant's own failure to testify, or (2) it appears that the defendant is the only one who could explain or contradict the state's evidence. State v. Fuller, supra; United States v. Soulard, supra; State v. Still, 119 Ariz. 549, 582 P.2d 639 (1978).

We find no violation of defendant's fifth amendment rights. The prosecutor's statement reflected the state's position that defendant failed to produce exculpatory evidence regarding a certain issue. It was not phrased to call attention to defendant's own failure to testify, nor does it appear from the record that defendant was the only one who could explain or contradict the state's evidence.

VII. JURY INSTRUCTIONS

Defendant argues that three alleged errors in the giving of

instructions denied him a fair trial.

First, the trial court gave the following instruction without objection from either defense counsel:

> "The state must prove the defendant's guilt beyond a reasonable doubt. If the evidence is susceptible of two equally reasonable interpretations, one of the defendant's guilt and the other of his innocence, it is your duty to adopt the interpretation of innocence."

Defendant now maintains that though he failed to object to the instruction, the giving of the instruction was fundamental error. Rule 21.3(c), Ariz. R. Crim. P.; State v. Tison, 129 Ariz. 526, 633 P.2d 335 (1981), cert. denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982). We find no fundamental error. The trial court's other instructions sufficiently informed the jury that it could not convict defendant if a reasonable doubt existed. This instruction could not have confused the jury. If anything, the instruction was advantageous to defendant, see State v. Harvill, 106 Ariz. 386, 476 P.2d 841 (1970); State v. Canedo, 115 Ariz. 60, 563 P.2d 315 (App. 1977), vacated on other grounds, 125 Ariz. 197, 608 P.2d 774 (1980), and he could not have been prejudiced by it.

Next, defendant argues that the trial court committed reversible error by failing to provide the jury a definition of reasonable doubt until eleven hours after deliberations began. Though the court had intended to do so, it failed to give either

a written or verbal definition of reasonable doubt. When the court realized its oversight, it reassembled the jury and read all the instructions, adding the reasonable doubt definition both verbally and in written form. The next day, the jury returned its verdicts. We find no error.

First, though the trial court must always instruct the jury that the prosecution must prove its case beyond a reasonable doubt, there is no requirement that a trial court define reasonable doubt for the jury. The court, however, may do so if it sees fit. State v. Hatton, 116 Ariz. 142, 568 P.2d 1040 (1977); State v. Canedo, supra; see also United States v. Miller, 688 F.2d 657 (9th Cir. 1982); United States v. Witt, 648 F.2d 608 (9th Cir. 1981). Thus, even the total failure to define reasonable doubt could not have resulted in reversal. Second, the trial court eventually defined reasonable doubt for the jury, giving it both an appropriate written and verbal definition.

Finally, defendant claims the trial court committed reversible error during the rereading of the instructions. Regarding identification evidence, the trial court stated:

> "If after examining the [identification] testimony you have a reasonable doubt as to the accuracy of the identification, you may [instead of must] find the defendants not guilty. (emphasis added).

Defense counsel pointed out the court's mistake, but the court declined to reread the instructions a third time stating that the

jury had the correct law in written form.

We find no reversible error. The trial court had correctly read the same instructions to the jury the previous day, and the jury at all times had a written copy of the instruction with proper language. Reading the instructions as a whole, we do not believe the jury would have been mislead by the trial court's mistake. See Kinsey v. State, 49 Ariz. 201, 65 P.2d 1141 (1937); see also 75 Am. Jur.2d, Trial § 925 (1974).

VIII. DEATH PENALTY ISSUES

A. Constitutionality

Defendant next argues that the Arizona death penalty is unconstitutional because (1) the jury takes no part in the sentencing determination; (2) A.R.S. § 13-703(B) gives the trial court no guidance as to what the mitigating factors are; (3) A.R.S. § 13-703 gives the trial judge no guidance on how to weigh mitigating factors against aggravating circumstances; (4) the death penalty is cruel and unusual; (5) the burden of proof is placed upon defendant with respect to mitigation; (6) the prosecutor has discretion to decide in which cases the death penalty will be sought; (7) Arizona has not adequately defined the terms "heinous, cruel or depraved"; and (8) Arizona law requires imposition of the death penalty when one aggravating

circumstance exists and there are no mitigating factors.

We have previously considered and rejected all these arguments and do so again today. See State v. Patrick Poland, ___ Ariz. ___, ___ P.2d ___ (1985) [No. 4970-2, filed March 20, 1985] (jury sentencing); State v. Mata, 125 Ariz. 233, 609 P.2d 243 cert. denied, 449 U.S. 438, 101 S. Ct. 338, 66 L.Ed.2d 161 (1980) (what is a mitigating factor and how is it weighed); State v. Richmond, 114 Ariz. 186, 560 P.2d 41 (1976), cert. denied, 433 U.S. 915, 97 S.Ct. 298, 53 L.Ed.2d 1101 (1977) (death penalty not cruel and unusual); State v. Richmond, 136 Ariz. 312, 666 P.2d 57 57, cert. denied, ___ U.S. ___, 104 S.Ct. 435, 78 L.Ed.2d 367 (1983) (burden on defendant to show mitigating circumstances); State v. Gretzler, 126 Ariz. 60, 612 P.2d 1023 (1980), cert. denied, 461 U.S. 971, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983) (prosecutorial discretion); State v. Ortiz, 131 Ariz. 195, 632 P.2d 1020 (1981) cert denied, 456 U.S. 984, 102 S.Ct. 2259, 72 L.Ed.2d 863 (1982) (adequate definition of "heinous, cruel, or depraved"); State v. Jordan, 137 Ariz. 504, 672 P.2d 169 (1983) (death penalty not unconstitutional because it requires death sentence if one or more aggravating circumstances outweigh mitigating factors).

B. Propriety of the Death Sentence in This Case

As in all death penalty cases this Court independently

reviews the record determining the existence and weight of aggravating circumstances and the propriety of the sentence. State v. Nash, ____ Ariz. ____, 694 P.2d 222 (1985).

In imposing the death penalty, the trial court found five aggravating circumstances: A.R.S. § 13-703(F)(1), - 703(F)(2), -703(F)(3), -703(F)(5), and -703(F)(6).

We find the existence of A.R.S. § 13-703 (F)(1), that "defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable." On September 9, 1981, a judgment of conviction was entered and death penalty imposed against defendant in Cook County, Illinois for three counts of first degree murder.

We also find the existence of A.R.S. § 703(F)(2) that "defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person." On September 9, 1981 judgment was entered against defendant in Cook County, Illinois on three counts of armed robbery and three counts of aggravated kidnapping. We take judicial notice that all these crimes involve the use or threat of violence against others. See State v. Nash, supra.

We do not find the existence of A.R.S. § 13-703(F)(3) that "[i]n the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense." As we held in State v.

McCall, supra, Marilyn Redmond was an intended victim of the crime, not a bystander in the zone of danger during defendant's murderous act. Her miraculous survival does not alter this fact. A.R.S. § 13-703(F)(3) has no application to this case. See State v. McCall, supra.

We find the existence of A.R.S. § 13-703 (F)(5) that "defendant committed the offense as consideration for the receipt or in expectation of the receipt, of anything of pecuniary value." Arnold Merrill testified that Robert Cruz gave defendant a stack of $100 bills apparently as prepayment for the murders. Nina Marie Louie testified that Ed McCall told her the murders were contract killings. She also stated that defendant told her in early December that he had a big job to do that was "not very pretty" for which he would receive $50,000. In addition, Louie also testified that, shortly before the murders, all three assailants were armed with guns, and they were talking about coming into large amounts of money and doing an important job. This evidence is sufficient to establish that defendant was a hired murderer. A.R.S. § 13-7603(F)(5) indisputably applies to this situation. State v. McCall, supra; State v. Adamson, 136 Ariz. 250, 665 P.2d 972, cert. denied, ____ U.S. ____, 104 S.Ct. 204, 78 L.Ed.2d 178 (1983).

Finally, we agree with the trial court that "defendant committed the offense in an especially heinous, cruel or depraved manner." A.R.S. § 13-703(F)(6).

Cruelty includes the infliction of physical pain or mental distress upon a victim. State v. McCall, supra; State v. McDaniel, 136 Ariz. 188, 665 P.2d 70 (1983); State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977), cert. denied, 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978). The defendant must intend or reasonably foresee that the victim will suffer because of defendant's acts. State v. McCall, supra; State v. Adamson, supra. In analyzing the instant facts we quote from State v. McCall, supra, whose identical facts and analysis are applicable here.

> "The Redmonds and Mrs. Phelps were herded about the Redmond home at gunpoint by three men. After giving up their valuables, they were forced to lie down on a bed, had their hands taped behind their backs, and were gagged with socks. They knew that their captors were armed. [In addition, one of the attackers said 'we don't need these two anymore' immediately before the shooting started.] It may be inferred that [the victims] were uncertain as to their ultimate fate. State v. Steelman, 126 Ariz. 19, 612 P.2d 475 (1980). Except for the first victim, each of them had to endure the 'unimaginable terror' of having their loved ones shot to death within their hearing and then having to wait for their own turn to come. State v. Gretzler, 135 Ariz. at 53, 659 P.2d at 12. Such mental distress clearly constitutes cruelty. State v. Gretzler, supra; State v. Steelman, supra. In addition, expert medical testimony was given that Mrs. Phelps did not die from the first gunshot wound to her head, that she did not lose consciousness as a result thereof, and that she most certainly suffered pain from that wound. The infliction of such physical pain also clearly constitutes cruelty."

State v. McCall, 139 Ariz. at 161, 677 P.2d. at 934.

The finding of A.R.S. § 13-703(F)(6) is also justified by two factors showing defendant's heinousness or depravity. The concepts of "heinousness" and "depraved" involve the killer's vile state of mind at the time of the murder. State v. McCall, supra; State v. Gretzler, supra. Here, the murderers not only shot Pat Redmond twice through the head, but also slashed his throat at the time of his death or shortly thereafter. The infliction of gratuitous violence or the needless mutilation of the victim indicates depravity or heinousness. State v. McCall, supra, and cases cited therein. Additionally, the murderers killed Mrs. Phelps, an elderly houseguest of the Redmonds with no possible interest in their business affairs. Her murder in no way furthered the plan of the killers. Heinousness or depravity can be indicated by the senselessness of the crime or the helplessness of the victim. State v. McCall, supra; State v. Zaragoza, 135 Ariz. 63, 659 P.2d 22, cert. denied, 462 U.S. 1124, 103 S.Ct. 3097, 77 L.Ed.2d 1356 (1983); State v. Ortiz, supra.[8]

The trial court also considered all possible mitigating

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8 We cannot agree with the trial court that heinousness and depravity were also shown by one of the killer's statements immediately before the killings that "we don't need these two anymore." It was never proven which of the three murderers made this statement, and we cannot impute vileness on all three men because of the statement of one of them.

circumstances but found none to exist. We agree. At the sentencing hearing, defendant took the stand and testified that he was not in Arizona on December 31, 1980 and that he never killed anyone in Arizona. The jury, of course, had previously found just the opposite to be true, and ample evidence supported the jury's verdict. Defendant's claim of innocence is not a mitigating factor in this case. Reviewing the record, we find no other mitigating circumstances.

In addition, we have reviewed this case in light of Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) and find imposition of the death penalty proper. Though defendant had accomplices, the record contains sufficient evidence that defendant killed, attempted to kill, or intended to kill.

C. Proportionality Review

Lastly, this court examines prior cases to "determine whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." State v. Nash, supra, ___ Ariz. at ___, 694 P.2d at 236. Having examined other cases in which the defendant received the death penalty based on one or more of the aggravating circumstances found here, we find imposition of the death penalty not disproportionate. See State v. Harding, 141 Ariz. 492, 687 P.2d 1247 (1984); State v. Fisher, 141 Ariz. 227,

686 P.2d 730, cert. denied, ___ U.S. ___, 105 S. Ct. 548, 85 L.Ed.2d 436 (1984), State v. McCall, supra; State v. Adamson, supra; State v. Woratzeck, 134 Ariz. 452, 657 P.2d 865 (1982).

We have also examined cases in which the death penalty was reduced to life imprisonment. See, e.g., State v. Graham, 135 Ariz. 209, 660 P.2d 460 (1983); State v. Valencia, 132 Ariz. 248, 645 P.2d 239 (1982). We believe imposition of the death penalty is justified.

Pursuant to A.R.S. § 13-4035 we have examined the entire record for fundamental error and have found none. The judgment of conviction and the sentences are affirmed.

FRANK X. GORDON, JR.
Vice Chief Justice

CONCURRING:

WILLIAM A. HOLOHAN
Chief Justice

JACK D. H. HAYS
Justice

JAMES DUKE CAMERON
Justice

STANLEY G. FELDMAN
Justice

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARIZONA REVISED STATUTES

Sec. 13-703(E)

On determining whether to impose a sentence of death or life imprisonment without possibility of parole until the defendant has served 25 calendar years, the Court shall take into account the aggravating and mitigating circumstances included in sub-section F and G of this section and shall impose a sentence of death if the Court finds one or more of the aggravating circumstances enumerated in sub-section F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

Sec. 13-703(F)

Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which Arizona law is a sentence of life imprisonment or death was possible.
2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.
3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.
4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.
5. The defendant committed the offense as consideration for the receipts, or in expectation of the receipts of anything of pecuniary value.
6. The defendant committed the offense in an especially heinous, cruel, or depraved manner.
7. The defendant committed the offense while in the custody of the Department of Corrections, a law enforcement agency or county or city jail.
8. The defendant has been convicted of one or more other homicides as defined in section 13-1101, which were committed during the commission of the offense.

Sec. 13-703(G)

Mitigating circumstances shall be any factors proffered by the defendant or the state which are revelant in determining whether to impose a sentence less than death, including any aspects of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired but not so impaired as to constitute a defense to prosecution.
2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.
3. The defendant was legally accountable for the conduct of another under the provisions of section 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.
4. The defendant could not reasonably have forseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause or would create a grave risk of causing death to another.
5. The defendant's age.

EDITOR'S NOTE

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ORIGINAL

NO. 85-5776

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

WILLIAM BRACY,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent,

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

ROBERT K. CORBIN
Attorney General of
the State of Arizona

WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division

GERALD R. GRANT
Assistant Attorney General
Department of Law
1275 W. Washington, 1st Floor
Phoenix, Arizona 85007
Telephone: (602)255-4686

Attorneys for RESPONDENT

Questions Presented

1. Whether alleged misconduct by the prosecution deprived petitioner of a fair trial or due process of law?

2. Whether petitioner has stated a constitutional claim with respect to the admission of eyewitness identification testimony at trial?

3. Whether a limitation on cross-examination of a rebuttal witness denied petitioner his constitutional right to confrontation?

4. Whether petitioner has stated a constitutional claim with respect to the admission of photographs of the victims?

5. Whether the prosecutor commented on petitioner's failure to testify?

6. Whether petitioner has a constitutional right to jury participation in the capital sentencing decision?

7. Whether Arizona's death penalty statute results in arbitrary and capricious imposition of the death penalty?

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

STATEMENT OF THE CASE

At approximately 7:00 p.m. on December 31, 1980, three armed men entered the Phoenix home of Patrick and Marilyn Redmond. The men used their weapons to subdue Mr. and Mrs. Redmond and Helen Phelps, Mrs. Redmond's mother who was visiting for the holidays. After taking money and jewelry from the victims, the assailants herded them into the master bedroom. They then ordered the victims to lie face down on the bed, bound and gagged them, and began shooting them. The assailants also slashed Mr. Redmond's throat with a knife. Both Mr. Redmond and Mrs. Phelps died from gunshot wounds to the head. Although Mrs. Redmond had also been shot in the head, she survived.

One week later the state charged Edward Lonzo McCall with the first-degree murders of Mr. Redmond and Mrs. Phelps, the attempted first-degree murder of Mrs. Redmond, and several other felonies. Five months after that the state charged Robert Charles Cruz with the same crimes; it also added a charge of conspiracy to commit first-degree murder, naming Cruz and McCall as coconspirators. In August of 1981, the state charged petitioner and Murray Hooper with the same crimes it had charged against McCall and Cruz.

On November 9, 1981, the trial of McCall and Cruz began. On December 10, 1981, the jury found both men guilty on all counts. The trial court imposed death sentences for both men.[1]

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1. The Arizona Supreme Court affirmed McCall's convictions and sentences, and this Court denied his petition for writ of certiorari. State v. McCall, 139 Ariz. 147, 677 P.2d 920 (1983), cert. denied, ____U.S.____, 104 S.Ct. 2670, 81 L.Ed.2d 375 (1984). The Arizona Supreme Court reversed Cruz' convictions. State v. Cruz, 137 Ariz. 541, 672 P.2d 470 (1983). He is presently awaiting retrial.

The trial of petitioner and Hooper began in late October of 1982. The state presented testimony from Marilyn Redmond, who identified petitioner, Hooper and McCall as the three men who had entered her home and killed her husband and her mother. Another state witness, Arnold Merrill, described his involvement in the killing of Mr. Redmond. According to Merrill, in September of 1980 Cruz had offered him $10,000 to kill Mr. Redmond, but Merrill refused the offer. In early December of 1980, Merrill accompanied Cruz to the Phoenix airport where they met petitioner and Hooper, who had just arrived on a flight from Chicago. The two men stayed in Phoenix for a week, during which time Merrill drove them around town and introduced them to McCall. Merrill was present when Hooper made an unsuccessful attempt to kill Mr. Redmond. Petitioner and Hooper returned to Chicago a few days later. However, on December 30, 1980, the two men returned to Phoenix. The next night, after the killings at the Redmond home, petitioner, Hooper and McCall came to Merrill's house and told him of the killings. The state also presented testimony from Dean Bauer, who had purchased at Cruz' request airplane tickets to and from Chicago for petitioner and Hooper. George Campagnoni testified that he had driven petitioner and Hooper to the Phoenix airport for return flights to Chicago on December 10 and 31, 1980. Another state witness, Nina Marie Louie, testified that she had met petitioner and Hooper during their first trip to Phoenix in early December, that petitioner had bragged he would return to Phoenix to do a "big job," and that petitioner, Hooper and McCall had left her home on the evening of December 31, 1980, to do their "job."

On December 24, 1982, the jury found petitioner and Hooper guilty on all counts. Pursuant to Ariz.Rev.Stat.Ann. § 13-703, the trial court held an aggravation-mitigation hearing on February 4, 1983. On February 11, 1983, the trial court imposed sentence. The trial court found five aggravating circumstances (that petitioner had prior convictions punishable by death or life imprisonment, that petitioner had prior convictions involving the use of violence, that petitioner created a grave risk of death to Mrs. Redmond, that petitioner committed the murders for pecuniary gain, and that petitioner committed the murders in an especially heinous, cruel and depraved manner) and no mitigating circumstances sufficiently substantial to call for leniency. Consequently the trial court imposed the death penalty for the murders of Mr. Redmond and Mrs. Phelps. The trial court also imposed a life sentence for the conspiracy conviction and prison terms of 35 years for each of the remaining counts. The trial court ordered the kidnapping sentences to run concurrently with each other but consecutively to the attempted murder sentence, that the armed robbery sentences run concurrently with each other but consecutively to the kidnapping sentences, that the burglary sentence run consecutively to the armed robbery sentences, and that the conspiracy sentence run consecutively to the burglary sentence. Hooper received the same sentences.

By notice filed February 16, 1983, petitioner appealed from the judgments of guilt and sentences imposed. On April 8, 1983, petitioner and Hooper filed a motion to vacate judgment. The motion alleged that the

prosecution had failed to disclose information concerning benefits given to Arnold Merrill. The Arizona Supreme Court stayed the appeal pending disposition of this motion. The trial court heard evidence concerning these allegations in July and September of 1983. On October 20, 1983, the trial court made the following findings: (1) that Dan Ryan, an investigator for the county attorney's office, had advanced the sum of $414.00 to Kathy Merrill (Arnold Merrill's wife) for her car payments, that he was only partially reimbursed, and that this assistance was a benefit to the Merrills; (2) that Mrs. Merrill received approximately $3,000.00 from the Maricopa County Attorney's Protected Witness Program; and (3) that Arnold Merrill had made long distance telephone calls from the county attorney's office, some with the knowledge and consent of Dan Ryan. The trial court concluded that these matters should have been disclosed to the defense but were not. However, the trial court denied relief because the matters were cumulative and would not have changed the verdicts. By notice filed November 7, 1983, petitioner and Hooper appealed from that order, and that appeal was consolidated with the earlier appeal.

On June 10, 1985, the Arizona Supreme Court affirmed the convictions and sentences of petitioner and Hooper. State v. Hooper, ____Ariz.____, 703 P.2d 482 (1985); State v. Bracy, ____Ariz.____, 703 P.2d 464 (1985). On August 20, 1985, the Arizona Supreme Court denied petitioner's motion for reconsideration. The instant petition for writ of certiorari followed.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3).

ARGUMENTS

I

ALLEGED MISCONDUCT BY THE PROSECUTION DID NOT DEPRIVE PETITIONER OF A FAIR TRIAL OR DUE PROCESS OF LAW.

Petitioner contends that misconduct by the prosecution deprived him of a fair trial and due process of law. The Constitution guarantees a fair trial through the due process clauses, and this Court has defined a fair trial as a trial whose result is reliable. See Strickland v. Washington, ____U.S.____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Respondent submits any misconduct by the prosecution in this case did not deprive petitioner of a fair trial.

Petitioner begins by complaining that the prosecution opposed his pretrial requests for transcripts of related proceedings, access to a computer research terminal, and access to the Redmond home. What petitioner does not mention is that the trial court granted each of these requests. Since petitioner got exactly what he wanted, any "misconduct" by the prosecution with respect to these requests had no effect on the reliability of the verdicts in this case.

Petitioner next points to the prosecutor's opening statement to the jury. In that statement the prosecutor said that Nina Marie Louie had made positive pretrial identifications of both petitioner and Hooper. At the time of the opening statement, the trial court had not yet ruled on a defense motion to suppress Ms. Louie's identifications. The trial court later ruled that the

pretrial identification procedure had been unduly suggestive, and that Ms. Louie would not be allowed to testify about those identifications. Ms. Louie did make in-court identifications of both petitioner and Hooper. At the end of her testimony, the trial court instructed the jury to disregard the prosecutor's reference to pretrial identifications by Ms. Louie. Thus, due to the trial court's ruling and admonition, no prejudice resulted from the prosecutor's statement.

Petitioner alleges the prosecutor acted improperly in submitting to an interview that appeared in a local magazine. Voir dire examination of the jury panel established that no veniremen had seen the article. The trial court then instructed the panel not to read it. Once again, the prosecutor's conduct had no effect on the reliability of the verdicts in this case.

Petitioner also alleges that a key government witness acknowledged at trial that, while he was in custody, an investigator for the prosecution "arranged for his removal from jail so that he could have sex with his wife." (Petition, at 8.) Petitioner has misstated the witness' testimony. What the witness, Mr. Merrill, said was that the investigator had allowed him to visit his wife and that Merrill had used this opportunity to have sexual relations with her. Petitioner presented evidence of this misconduct to the jury and he was free to argue whatever inferences from that evidence he chose. No prejudice resulted to petitioner.

Petitioner complains that the prosecutor in closing argument urged the jury to draw an adverse inference from the fact that a witness had not appeared at the trial. When defense counsel objected to the prosecutor's argument,

the trial court gave the jury an appropriate cautionary instruction. That instruction dispelled any prejudice petitioner may have suffered.

In continuing his attacks on the prosecution, petitioner turns to a series of allegations regarding the prosecution's failure to disclose certain evidence. Petitioner complains of alleged untimely disclosure of a police report that contained "horribly incriminating" statements made by petitioner to another witness and a police officer's handwritten notes that contradicted his final report. Both of these items were inculpatory, not exculpatory, and thus any failure to timely disclose them does not violate this Court's holding in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and its progeny. Further, petitioner fails to mention a number of important facts regarding these items. The trial court excluded from trial the report containing petitioner's "horribly incriminating" statements, and the witness to whom petitioner made those statements never testified at trial. As for the handwritten notes, the officer who had made them had testified about them at the trial of McCall and Cruz. The prosecution had provided petitioner with transcripts of that testimony prior to petitioner's trial. Thus, the substance of the notes had been disclosed to the defense, although the actual notes had not. Petitioner argues that his defense was primarily based on a claim of misidentification of petitioner by Mrs. Redmond, and that the prosecution, by failing to disclose the notes, misled him into believing that a strong misidentification defense existed. The untimely disclosure, petitioner asserts, forced a change of strategy in the middle of trial. This is nonsense for a number of reasons. First, it ignores the

fact that the prosecution had provided petitioner with the substance of the notes prior to trial. Second, the notes differed from the final report in one aspect: according to the notes, Mrs. Redmond had told the officer that three men, two of them black and one of them white, had attacked her and her family; according to the final report, Mrs. Redmond said that all three of the assailants were black men. While this distinction may have been critical to a claim by McCall (who is white) that Mrs. Redmond had misidentified him, it is certainly less than critical to petitioner, who is black. Third, there was no change of defense strategy in this case. Mrs. Redmond would have identified petitioner as one of the murderers of her husband and her mother no matter what the officer's notes said. Thus, petitioner's strategy had to be an attack on the accuracy of her identification. Therefore, the prosecution's conduct regarding the "horribly incriminating" statements and the handwritten notes had no impact on the fairness of petitioner's trial.

Petitioner also complains about untimely disclosure of police reports concerning the arrests of three other men as suspects in these killings, photographs of those three men, and the payment of benefits totaling $878 to Nina Marie Louie. Petitioner again omits important facts regarding these items. Petitioner presented evidence to the jury detailing the benefits to Ms. Louie. He could have done nothing more if the evidence regarding the payments had been more timely disclosed to petitioner. As for the photographs of the three suspects, the trial court sustained defense objections to their admission and instructed the jury to disregard any mention of them. Finally, petitioner received copies of the police reports

on these suspects on November 15, 1982 (not November 22 as petitioner alleges). Three weeks later, the defense made use of the reports by presenting evidence of their contents to the jury. Petitioner never asked the trial court for additional time to conduct further investigation into the reports. Thus, petitioner's claim that something more could have been done with the information had it been timely disclosed is a belated attempt to manufacture prejudice where there plainly was none. There is no reasonable probability that the result in this case would have been different had more timely disclosure been made. Therefore, petitioner is not entitled to relief. United States v. Bagley, ___U.S.___, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); Brady v. Maryland, supra.

For his final attack on the prosecution, petitioner asserts that the prosecution failed to disclose evidence regarding the payment of benefits to Arnold Merrill. These are the same allegations that are the substance of codefendant Hooper's petition for writ of certiorari presently before this Court. See Murray Hooper v. State of Arizona, No. 85-705. The undisclosed evidence regarding Merrill amounted to cumulative impeachment. At trial, petitioner presented a wealth of evidence of this nature to impeach Merrill. Since the trial court and the Arizona Supreme Court considered this undisclosed evidence in the context of the entire record and concluded it would have had no effect on the verdicts, there is no basis for relief from this Court. United States v. Bagley, supra.

II

PETITIONER HAS FAILED TO STATE A CONSTITUTIONAL CLAIM WITH RESPECT TO THE ADMISSION OF EYEWITNESS IDENTIFICATION TESTIMONY AT HIS TRIAL.

Petitioner argues that the admission of identification testimony at his trial deprived him of due process of law. Specifically, petitioner claims that the pretrial identification procedure in which Mrs. Redmond identified him was unduly suggestive and created an intolerable risk that her in-court identification of him was unreliable. Respondent submits that petitioner has failed to state a constitutional claim.

Petitioner is not arguing that the Arizona Supreme Court misapplied the standard set by this Court's decision in Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), and Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). Nor is petitioner claiming that there was no evidence to support the Arizona Supreme Court's conclusion that Mrs. Redmond's identification of petitioner was reliable. The Arizona Supreme Court clearly set forth the evidence it relied on in reaching that conclusion. See State v. Bracy, supra, 703 P.2d at 475-76. Petitioner is simply claiming that there is conflicting evidence from which conflicting inferences and conclusions may be drawn. In short petitioner is asking this Court to substitute its assessment of the evidence for that of the Arizona Supreme Court. Such a request does not raise a constitutional claim.

III

THE TRIAL COURT DID NOT DENY PETITIONER HIS CONSTITUTIONAL RIGHT TO CONFRONTATION WHEN IT REFUSED TO ALLOW PETITIONER TO QUESTION A REBUTTAL WITNESS ABOUT A PENDING CHARGE OF CRIMINAL CONTEMPT.

Petitioner contends that the refusal of the trial court to permit cross-examination of the prosecution's investigator on pending contempt charges deprived him of his constitutional right to confrontation. The Sixth Amendment right of an accused to confront the witnesses against him includes the right of cross-examination; that right is enforced against the states under the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). Respondent submits that the right of cross-examination is not limitless and is subject to reasonable restraints imposed by a trial court.

At trial petitioner and his codefendant elicited testimony fron a number of witnesses to the effect that the prosecution's investigator, Dan Ryan, had engaged in various acts of misconduct in his investigation of the case.[2] The prosecution then called Ryan as a rebuttal witness and questioned him about the allegations the defense had made against him. Prior to cross-examination, petitioner and Hooper asked the trial court to allow them to question Ryan about the fact that criminal contempt charges were pending against him. The trial court denied the request, noting that the charges were not relevant and that any probative value was outweighed by the prejudicial

2. The trial court in the trial of Joyce Lukezic (a codefendant of petitioner and Hooper) had cited Ryan for contempt of court based upon some of the claims of misconduct. Ryan was later acquitted of the charge.

effect. Petitioner and Hooper then cross-examined Ryan about the misconduct allegations; the pending contempt charge was not mentioned.

If the right to effective cross-examination is denied, constitutional error exists without the need to show actual prejudice. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). However, the extent of cross-examination is a matter within the sound discretion of the trial court. Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed.2d 624 (1931). The record in the instant case establishes that a special, independent prosecutor who was not a member of the office prosecuting petitioner had responsibility for prosecuting Ryan on the contempt charge. The record also establishes that the jury was well aware of the serious nature of the misconduct allegations and of the possibility of criminal liability if the allegations proved true. Thus, Ryan's bias, motive and self-interest were apparent to the jury. The trial court's refusal to allow mention of one additional fact (that a contempt charge was actually pending against Ryan) was not unreasonable and did not result in a violation of petitioner's constitutional rights.

IV

PETITIONER HAS FAILED TO STATE A CONSTITUTIONAL CLAIM WITH RESPECT TO THE ADMISSION OF PHOTOGRAPHS OF THE VICTIMS.

Petitioner argues that the admission of "gruesome" photographs of the victims deprived him of his constitutional right to a fair trial. The admission of evidence of this sort is essentially a matter of trial court discretion, not of federal constitutional rights. The photographs gave the jury a complete view of the murder scene and supported the prosecution's theory that these

were premeditated, intentional, gangland-style contract killings. The defense never conceded that the killings were premeditated or the killers were hired. Thus, the photographs were not offered for the sole purpose of prejudicing the jury against petitioner. Further, the photographs raise no doubts about the reliability of the verdicts in this case. See Strickland v. Washington, supra. Petitioner's position is meritless.

V

THE PROSECUTOR DID NOT COMMENT IN CLOSING ARGUMENT ON PETITIONER'S FAILURE TO TESTIFY.

Petitioner contends that the prosecutor commented in closing argument on petitioner's failure to testify. It is a violation of the privilege against self-incrimination to tell a jury in a state criminal trial that a defendant's failure to testify supports an unfavorable inference against him. Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). Respondent submits that the prosecutor did not call attention to petitioner's failure to testify and did not draw any unfavorable inference from that fact.

The remarks petitioner complains of came during the prosecutor's rebuttal argument:

> [THE PROSECUTOR:] Mr. Woods (Hooper's attorney) told you in his opening statement that Cruz and Merrill tried to get Bracy and Hooper involved in the South Phoenix drug deal and Bracy and Hooper said no, take a hike. You didn't hear any evidence to that effect.

Both defense attorneys objected to these remarks and the trial court instructed the jury to disregard them.

The remarks made no reference to petitioner's failure to testify. The prosecutor merely pointed out there had been no evidence to support an allegation by Hooper's

counsel. Such evidence could have come from witnesses other than petitioner or Hooper: Merrill, for instance. Petitioner's claim that the remarks sought to stress his silence as evidence of guilt is baseless. Petitioner is not entitled to relief.

VI

PETITIONER HAS NO FEDERAL CONSTITUTIONAL RIGHT TO HAVE A JURY INVOLVED IN THE CAPITAL SENTENCING DECISION.

Petitioner argues that Arizona's death penalty statute violates his rights under the Sixth and Fourteenth Amendments to have a jury pass on the factual questions that might lead to the imposition of the death penalty. This Court has held that there is no constitutional right to jury sentencing in a capital case. Spaziano v. Florida, ___U.S.___, 104 S.Ct. 3154, 3162-63, 82 L.Ed.2d 340, 351-53 (1984). Petitioner is not entitled to relief from this Court.

VII

ARIZONA'S DEATH PENALTY STATUTE PROVIDES SUFFICIENT GUIDANCE TO THE TRIAL COURT.

Petitioner attacks Arizona's death penalty statute because it does not define what a mitigating circumstance is and because it offers the trial court no guidance on how to weigh mitigating factors against aggravating factors. Thus, petitioner concludes, Arizona's statute results in arbitrary and capricious imposition of the death penalty in violation of the Eighth and Fourteenth Amendments.

Petitioner's position is meritless. Arizona's "open ended" approach to the consideration of any relevant mitigating evidence was mandated by this Court's decisions in Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), and Lockett v. Ohio, 438 U.S. 586, 98

S.Ct. 2954, 57 L.Ed.2d 973 (1978). In addition, the Arizona Supreme Court has provided sentencing judges with guidance in the areas petitioner complains of. See, e.g., State v. Leslie, No. 5806-2, slip op. at 20-23 (Ariz.Sup.Ct., Oct. 9, 1985)[3]; State v. Gretzler, 135 Ariz. 42, 53-56, 659 P.2d 1, 12-15, cert. denied, ___ U.S.___, 103 S.Ct. 2444 (1983); State v. Mata, 125 Ariz. 233, 241-42, 609 P.2d 48, 56-57, cert. denied, 449 U.S. 438 (1980). Arizona's death penalty procedure sufficiently channels the discretion of the sentencing court in compliance with the concerns voiced by this Court in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Petitioner is not entitled to relief.

CONCLUSION

Because petitioner has failed to establish a violation of any of his constitutional rights, this Court should deny the petition for certiorari.

DATED this 2nd day of December, 1985.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General

Gerald R. Grant

GERALD R. GRANT
Assistant Attorney General

Attorneys for RESPONDENT

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3. Respondent has attached a copy of the Leslie slip opinion as Appendix A to this response.

AFFIDAVIT

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

GERALD R. GRANT, being first duly sworn upon oath, deposes and says:

That he served petitioner in the foregoing case by forwarding one (1) copy of RESPONSE TO PETITION FOR WRIT OF CERTIORARI, in a sealed envelope, first class postage prepaid, and deposited same in the United States mail, addressed to:

WILLIAM BRACY
Register Number C-01532
Box 99
Pontiac, Illinois 61764

this 2nd day of December, 1985.

Gerald R Grant
GERALD R. GRANT

SUBSCRIBED AND SWORN to before me this 2nd day of December, 1985.

Susan C Lewis
SUSAN C. LEWIS
NOTARY PUBLIC

My Commission Expires:
October 17, 1988

CR43-050/7798D/scl

IN THE SUPREME COURT OF THE STATE OF ARIZONA
En Banc

FILED
OCT -9 1985
CLERK SUPREME COURT
BY

STATE OF ARIZONA, Appellee, v. PAUL CLYDE LESLIE, Appellant.	No. 5806-2

Appeal from the Superior Court of Maricopa County

Cause No. CR-118792

The Honorable Ed W. Hughes, Judge

REVERSED AND REMANDED

Robert K. Corbin, The Attorney General By William J. Schafer III and Georgia Ellerson, Assistant Attorneys General Attorneys for Appellee	Phoenix
Ross P. Lee, Maricopa County Public Defender By Dennis Dairman and James Edgar, Deputy Public Defenders Attorneys for Appellant	Phoenix

CAMERON, Justice

Defendant, Paul Clyde Leslie, was convicted and adjudged guilty of first degree murder, A.R.S. § 13-1105. He was sentenced to death pursuant to A.R.S. § 13-703. We have jurisdiction pursuant to Ariz. Const. art. 6, § 5(3) and A.R.S. §§ 13-4031 and -4035.

We must decide the following issues:

1. Did the trial court properly find that the police had probable cause to arrest defendant?

2. Was defendant denied his right to a speedy trial pursuant to the sixth amendment of the United States Constitution?

3. Did the trial court err in charging the jury by:

   a. failing to give a requested Willits instruction;

   b. failing to give defendant's requested instruction that burglary is a lesser-included offense of felony murder;

   c. failing to inform the jury that no unfavorable inference could be drawn from the failure of a witness to testify?

4. Was the death penalty properly imposed?

The facts follow. On 2 April 1981, the victim, Mrs. Mary V. Rabb, age 70, lived alone in Phoenix, Arizona. One of her neighbors had seen and talked with her that morning at around 7:00 A.M. when the two of them went for a brief walk. Rabb returned home at approximately 7:10. Sometime between 11:00 and 12:00 noon, the two women who lived next door to her noticed that her dog was running loose outside. Because this was unusual, they went to her house to see if everything was all right. Rabb did not come to the door when they knocked and they noticed that her car, a new white Oldsmobile, was gone. They returned to the house at 5:00 P.M., this time entering the premises. Mrs. Rabb's dead body was discovered in the garage. She had been hit

approximately twenty times around her head resulting in her death. Several rugs were covering the victim's body and there was a small, blood-stained ax found in the garage.

On the morning of April 2, 1981, defendant went to the Biltmore Gold and Silver, located several miles from the victim's home, and attempted to pawn several pieces of the victim's silver. When the owner of the store asked for his car registration, defendant left the store and drove away in a new white Oldsmobile, leaving behind the silver and his driver's license. Shortly after noon, defendant picked up two women hitchhikers at 35th Avenue and Buckeye Road. He was wearing women's shoes. One of the women took from the console between the two front seats a ring which was later determined to belong to the victim.

Defendant and his two passengers drove west toward California. When officers at Hope, Arizona, in what was then Yuma County, Arizona, attempted to arrest him for speeding, he exited the freeway, stopped at a gas station, got out of the car and ran, leaving the two women behind. The officers impounded the car and ascertained that it belonged to the victim. Several hours later, defendant was arrested.

At trial, defendant took the stand on his own behalf. He admitted having stolen the silver from Mrs. Rabb's house but denied killing her. He stated that he never saw her that day. He also stated, without offering an explanation, that he had put on one of her shirts and a pair of her shoes. The police were unable to find the shirt and shoes that he discarded. Defendant

was found guilty by a jury on 9 February 1984. From his conviction and sentence, he appeals. He also filed for review of the denial of his petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S. We consolidated the two matters for determination.

THE ARREST

Defendant first argues that the trial court erred in failing to grant the motion to suppress evidence obtained as a result of his illegal arrest.

On 2 April 1981 at 2:45 P.M., D.P.S. Officer Brad Watkins saw a white 1981 Oldsmobile sedan containing at least two people travelling on Interstate 10 near Hope in the Salome-Vicksburg-Wenden area of Yuma County, Arizona. Because the car was exceeding the speed limit, the officer attempted to pull it over. The car exited at Vicksburg Road and stopped at an Arco gas station. When the officer caught up with the vehicle, he saw two women who were attempting to run. He stopped them and they informed him that the car had been driven by a dark haired Mexican or Oriental male, standing approximately 5'8" and wearing dark clothing. The officer ran a license check on the car and determined that it was registered to the victim. The car had not, at that time, been reported stolen. Sergeant Harold and Deputy Pearson of the Yuma County Sheriff's Office also arrived at the Arco station and Officer Watkins related to them the conversation with the women. The women were then transported to the Sheriff's substation.

At approximately 6:00 P.M., the Yuma County Sheriff's Office

received a call that a Mexican looking male wearing dark blue clothing was trying to break into a trailer at that same truck stop. Pearson and Harold arrived at the truck stop and saw defendant standing there. He fit the description given them and they called him over to the car. As he was walking toward them, Sergeant Gosch of the Yuma County Sheriff's Office arrived. He informed the officers that the Phoenix Police Department was investigating a homicide at the home of the owner of the vehicle that Officer Watkins had stopped earlier.

When defendant arrived at the car, Sergeant Harold asked him for identification; he produced a Hawaii driver's license. Officer Pearson then got out of the car and talked to the woman who had telephoned the police about the burglary. She identified defendant as the man she had seen breaking into the trailer. Pearson also inspected the trailer and saw a broken window in the door of the trailer and shoe prints around the door area.

While Officer Pearson was making his inspection, Sergeant Harold talked with defendant. Because Sergeant Harold died prior to the suppression hearing, no testimony was offered as to their conversation. Sergeant Gosch testified, however, that defendant removed some items from his pockets, including the car keys to Rabb's Oldsmobile. Defendant was subsequently placed under arrest.

Defendant contends that "the fact that the [defendant] may have appeared to be a Mexican and was wearing dark clothing in front of a cafe in Salome * * * does not constitute probable cause to arrest him." Citing Florida v. Royer, 460 U.S. 491, 103

S.Ct. 1319, 75 L.Ed.2d 229 (1983), defendant additionally argues that he was arrested when Sergeant Harold asked him to empty his pockets. He, therefore, maintains that the car ke/s should have been suppressed as the fruits of an illegal search. The fourth amendment, U.S. Const. amend. IV, requires a showing of probable cause before a defendant may be arrested. We have defined probable cause as reasonable grounds to believe that an offense is being or has been committed by the person arrested. State v. Wiley, ___ Ariz. ___, 698 P.2d 1244 at 1250 (1985). Additionally, a defendant is arrested when his liberty of movement is interrupted and restricted by the police. State v. Green, 111 Ariz. 444, 446, 532 P.2d 506, 508 (1975). Whether such restriction has occurred is determined by an objective evaluation of the evidence and not by the subjective belief of the parties. Id.

Because Sergeant Harold was unavailable to testify, we are unable to determine whether defendant was free to leave when he emptied his pockets. The state, however, has the burden of showing that the arrest was proper. See State v. Edwards, 111 Ariz. 357, 360, 529 P.2d 1174, 1177 (1975). In the absence of proof to the contrary, we must assume that defendant was arrested at the time he relinquished the keys.

We do not find this assumption defeating, because we believe that the police had probable cause to arrest defendant at that time. They had previously received a report of an attempted burglary and were given a description of the suspect. Defendant both matched this description and was in the area of the crime

scene. It is noted that the Salome-Vicksburg-Wenden area is an area of sparse population, Salome the largest of the three communities having an estimated population of 606. Local people are readily recognized and strangers stand out. It is highly unlikely that there was another similarly dressed person fitting defendant's description in the vicinity. We believe there was probable cause to arrest defendant. We find no error.

SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL

Defendant next argues that he was denied his right to a speedy trial under the sixth amendment to the United States Constitution. In order to understand this argument, a brief chronology is necessary. Defendant was arrested on 2 April 1981, and indicted six days later. He was subsequently tried, and the jury returned a verdict of guilty to first degree murder on 1 September 1981. The trial judge was thereafter forced to disqualify himself from the sentencing because he had discussed defendant's potential sentence with a member of the victim's family. A new trial was ordered on 19 November 1981, pursuant to State v. McDaniel, 127 Ariz. 13, 617 P.2d 1129 (1980). The state filed a special action on 23 November 1981, appealing the order for a new trial and we declined jurisdiction. The state then sought relief in the court of appeals on 9 December 1981. On 11 June 1982, defendant filed a motion to dismiss the appeal alleging the state's failure to prosecute diligently. This motion was denied on 1 July 1982, by the court of appeals. On 15 February 1983, the state's appeal was transferred to this Court and we ordered a new trial. State v. Leslie, 136 Ariz.

463, 666 P.2d 1072 (1983). After a hearing to determine whether the state had violated Rule 8, Arizona Rules of Criminal Procedure, 17 A.R.S., defendant was retried on 31 January 1984. Defendant now argues that the time between the grant of a new trial by the trial court on 19 November 1981, and the Supreme Court order for new trial issued on 5 July 1983, constitutes "inexcusable delay" and that, pursuant to the sixth amendment, the charges against him should be dismissed with prejudice. We do not agree.[1]

The sixth amendment guarantees a defendant "the right to a speedy and public trial." U.S. Const. amend. VI. This right is triggered by either formal indictment, information or actual restraint of arrest. State v. Soto, 117 Ariz. 345, 348, 572 P.2d 1183, 1186 (1978). The United States Supreme Court has enunciated a balancing test to be used in determining whether a defendant has been denied this constitutional protection. Four factors must be considered: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of the right, and (4) the prejudice caused to the defendant. Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101

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[1] Defendant raises only the question of the violation of the sixth amendment to the United States Constitution in this appeal. He does not raise the question of violation of our speedy trial rules. Rule 8, Ariz. R. Crim. P., 17 A.R.S. That issue was raised in a special action proceeding (No. 17105-SA). We granted the petition and we remanded the matter to the trial court "for a proceeding pursuant to Rule 32, Arizona Rules of Criminal Procedure, 17 A.R.S. to determine what, if any, prejudice the petitioner, Paul Clyde Leslie, [had] suffered by reason of the delay in bringing [the] matter to trial." The trial court by order dated 5 December 1983 found no prejudice.

(1972). Of these four factors, the length of the delay is the least conclusive and the prejudice suffered by the defendant is the most important. Soto, supra. In fact, the length of the delay is essentially a triggering mechanism necessitating analysis of the other factors. State v. Wright, 113 Ariz. 313, 315, 553 P.2d 667, 669 (1976).

In the instant case, length of the delay, approximately twenty months, is not so long as to be prejudicial per se. Cf. Barker v. Wingo, supra (no per se violation when length of delay was approximately five years); United States v. Deleon, 710 F.2d 1218 (7th Cir. 1983) (no speedy trial violation where 44-1/2 month delay from time of arrest to commencement of trial). It is, however, sufficiently long to cause us to examine other factors.

We look first to the reasons for the delay. The state had filed a special action in this court and then sought relief in the court of appeals contesting the order requiring a new trial. Defendant argues that this was unnecessary and that after we denied jurisdiction the state should have proceeded directly to trial rather than pursuing the matter in the court of appeals. Defendant contends, therefore, that "the delay was totally unjustified."

We have held that the prosecution's exercise of its right to appeal from an adverse ruling is considered a justifiable excuse for delay. See State v. Million, 120 Ariz. 10, 14, 583 P.2d 897, 901 (1978). Thus, the state was within its rights in filing a special action. Furthermore, we do not believe that pursuing an

appeal in the court of appeals after we denied jurisdiction was improper. First, a denial of jurisdiction in a special action does not necessarily constitute a ruling on the underlying merits. Rather, it may indicate that the appealing party has an adequate remedy through the ordinary appellate channels. Thus, our initial denial should not be interpreted as indicating that the state's appeal was frivolous. Second, the prosecution had a strong interest in the appeal. This was a violent crime, which the state had already spent time and effort prosecuting. The state hoped to avoid expending additional time and money in presenting evidence to a second jury. Accordingly, we do not agree with defendant that the delay occasioned by the appeal was unjustifiable. Of course, if it could be shown that the appeal by the state was for the purpose of delay or harassment, we would view the matter differently.

As to the third factor, we find that defendant objected to the delays in a manner sufficient to demonstrate his interest in a prompt adjudication of his guilt. See Barker v. Wingo, supra.

We look then to the last and most important factor -- prejudice to the defendant arising from the delays. Defendant alleges that he was prejudiced in two ways. First, he was incarcerated during this time and the strain of his confinement had a negative impact on his physical appearance, and with it his credibility. Because his credibility was crucial to his defense, he maintains that he was harmed by this imprisonment. The harms alleged by defendant go essentially to his ability to conduct his defense and are speculative in nature. We are unconvinced that,

in general, a period of incarceration tends to impact upon one's credibility and find no evidence that it did so in this case.

Second, defendant contends that the delay caused him to lose a key defense witness. Throughout the trial, defendant admitted that he had burglarized the victim's house but denied killing her. He alleged that another person entered the house later and committed the murder. At the first trial, he had called one of the victim's neighbors, Linda Beverman. She testified that her life had been threatened because of her involvement in a "land deal." She also stated that on the morning of the attack she saw two strange men pacing back and forth between her house and the victim's house and that they frightened her. Defendant had argued that these men had intended to kill Mrs. Beverman but had mistakenly attacked the victim. At some point between the first and second trial, the witness left Phoenix and defendant was unable to find her. At the second trial, defendant was forced to read Mrs. Beverman's testimony from the first trial to the jury, rather than having the benefit of live testimony. He contends that this prejudiced his case.

We do not find that defendant was harmed. Even though we believe that "live" testimony is better than "read" testimony, we find that the prejudice in the instant case was too speculative to support an allegation of a sixth amendment violation. A defendant is entitled to a fair trial, not a perfect one. Bruton v. United States, 391 U.S. 123, 135, 88 S.Ct. 1620, 1627, 20 L.Ed.2d 476 (1968). We find no error.

JURY INSTRUCTIONS

Defendant raises several arguments concerning jury instructions. He argues that the trial court should have given a Willits instruction, an instruction on burglary as a lesser-included offense and an instruction concerning the use of previous testimony.

1. Loss of Evidence

At trial, Police Officer Billy Butler testified that he had examined Mrs. Rabb's car after it had been impounded and that he had noticed several spots on the emblem and the light in the front of the car. Because he believed that these spots were too small, he did not notify the crime lab or ask any technicians to analyze the spots. He did, however, testify as follows on direct examination:

Q. * * * have you had occasion to see blood before?

A. Yes.

Q. Very frequently?

A. Yes.

Q. Do you feel that you can recognize blood if you see it?

A. Yes.

* * *

Q. Now, these photographs marked 13 and 14, are they photographs of the car that you examined?

A. May I see the license plate? Yes, that's the same car.

Q. Now, did you examine that closely on the outside for blood?

A. Yes, we did.

Q. What did you find?

A. I found on the emblem, which is in the middle of the grille, what appeared to be minute spots of what I considered to be blood, also just above the emblem and also by one of the lights, what appeared to be a minute spot of blood.

* * *

Q. Do you have any opinion, based upon your experience, as to whether that was blood or not?

A. Due to my experience as a police officer and the numerous times --

* * *

OBJECTION BY DEFENSE COUNSEL

THE COURT: Overruled, proceed.

Q. (BY MR. LYNCH): What's your opinion?

A. In my opinion that was blood, yes.

* * *

Q. Did you try to scrape that blood off and have it submitted to the crime lab for analysis?

A. No sir, I did not.

Q. Why not?

A. It was too minute of an amount for the crime lab.

The state also called as a witness Everett Allen Raphael, a criminalist for the city of Phoenix. He stated, on cross-examination, that there was a sufficient amount of substance on the car to allow him to determine whether it was blood, although he would be unable to determine the type grouping or anything further. In closing argument, the prosecution also

stated:

> What about the blood on the car? Okay. Detective Butler should have had the car checked out by the crime lab. There is no question about that, and we can all see that, I can see it. * * * The fact of the matter is, it looked like blood.
>
> Detective Butler has seen blood before, you have all seen blood, there is a pretty strong inference that it was blood, blood that was put on the car after Mary Rabb was killed.

The fact that these spots may have been blood was a vital part of the state's case. Defendant admitted that he had burglarized the victim's residence but claimed he never saw her. The body was found in the garage near where the automobile was parked. There were no fingerprints on the murder weapon; neither was there blood on defendant nor on the inside of the car. In addition to its allegation of blood on the car, the state relied on the fact that defendant had admitted his presence in the house, that he was in possession of a ring that the victim usually wore, that he was wearing some of the victim's clothes, that a water hose in the backyard was uncoiled and that there was a damp towel found in the victim's house. The blood would indicate that the car was in the garage at the time of the murder and contradict defendant's testimony that he had not seen the victim at the time he burglarized the house and stole the car.

Based on this testimony, defendant requested a Willits instruction. See State v. Willits, 96 Ariz. 184, 393 P.2d 274 (1964). The trial court denied this request. Defendant contends this was reversible error.

The question of lost or destroyed evidence has generated a

great deal of case law. When items are lost or destroyed a defendant is unable to determine whether they would have been helpful in his defense. Our court has used, as one method of overcoming this problem and ensuring a fair trial, the Willits instruction. That instruction states:

> If you find that the state has destroyed, caused to be destroyed, or allowed to be destroyed any evidence whose contents or quality are in issue, you may infer that the true fact is against the interest of the state.

State v. Willits, supra.

In the instant case, we are concerned with evidence that was allowed to be destroyed or lost. The state has a duty to act in a timely manner to preserve evidence that is obviously material and reasonably within its grasp. State v. Perez, 141 Ariz. 459, 463, 689 P.2d 1214, 1218 (1984). A defendant is entitled to a Willits instruction upon proof that (1) the state failed to preserve material evidence that was accessible and might have tended to exonerate him and (2) there resulting prejudice. State v. Moffitt ___ Ariz. ___, 702 P.2d 681, 690 (1985). Further, a trial court's determination on whether or not to give a Willits instruction is not reversible error absent an abuse of discretion. Id.

The state's questions during trial and comments during closing argument testify strongly to the materiality of the lost evidence. Additionally, the state's own expert testified that he could have determined whether the substance had indeed been blood. Therefore, the first requirement of the test is met.

The issue of prejudice is crucial in the present case. Where the state places reliance on the evidence as blood, its duty of preservation becomes increasingly important. It is fundamentally unfair to allow the state to introduce conclusions as to the contents of certain evidence against a defendant without allowing him to inspect it in a manner that allows for meaningful rebuttal. Scales v. City Court of City of Mesa, 122 Ariz. 231, 234, 594 P.2d 97, 100 (1979). We might be able to overlook the failure to preserve the evidence had the state not emphasized the fact it was blood. The state, in effect, created prejudice by using the blood to contradict the defendant's claim that he had never seen the victim. Thus we find prejudice in the state's failure to remove the spots and have them preserved, coupled with the state's affirmative comments concerning the fact that the spots were blood. We hold that the trial court's failure to give the requested Willits instruction was an abuse of discretion amounting to reversible error.

2. Linda Baverman's testimony.

Defendant submitted two alternative instructions concerning Linda Baverman's testimony:

> (1) A good faith effort has been made by the defendant to locate Linda Baverman; thus, no unfavorable inference can be drawn against the defendant from her failure to appear and testify.
>
> (2) A good faith effort has been made to locate Linda Baverman; thus, no unfavorable inference can be drawn from her failure to appear and testify.

The trial judge refused to give these charges. Defendant now

maintains that the failure to give these requested instructions constituted reversible error. He gives two reasons for this assertion. First, he argues that "[b]y refusing to instruct the jury regarding how it was to evaluate the Beverman testimony, the court left open the possibility that the jury could disregard it merely because said witness was not present at trial." Second, defendant contends that the trial court's refusal to explain that no unfavorable inference could be drawn from defendant's use of previous testimony constituted fundamental error because the trial court failed to instruct "on all matters vital to the consideration of the evidence."

First, we find the claim that the jury might have disregarded Mrs. Baverman's testimony because she was not present to be without merit. The trial judge told the jury that it must decide the accuracy of <u>each</u> witness' testimony and the jury was aware that Mrs. Baverman was considered to be a witness. Additionally, both the prosecution and defense counsel spent several minutes addressing her testimony in their closing arguments, thus ensuring that the jury would realize the importance of her testimony and evaluate it during deliberations. Admittedly, as we have noted above, reading testimony is not the same as live testimony but we do not believe this demands a specific instruction in every case. The necessity for an instruction regarding the absence of a witness will be left to the sound discretion of the trial court.

We also reject defendant's second argument that failure to give the requested instruction constituted fundamental error.

Defendant contended that the jury might falsely infer that defendant was trying to hide something by not producing a live witness and felt that the jury charge was essential to eliminate this possibility. We do not find that failure to give this requested instruction was erroneous. "A judge need not give instructions on every subsidiary fact and possible inference. * * * As long as a judge gives adequate and clear instructions on the applicable law * * * [the] extent of the charge [is a matter] within his discretion." Commonwealth v. Phong Thu Ly, 471 N.E.2d 383, 384 (Mass. App. 1984). Jury instructions become too cumbersome if the trial judge is forced to instruct on minute, nonessential matters. The trial court must be able to limit what he will say to the jury in order that the instructions do not become so long and complex as to be confusing and useless. Even though, in the instant case, the offered instruction may have been a comment on the evidence where the defendant faces a murder conviction and presents only one witness, the trial judge sacrifices little efficiency by giving a clarifying instruction which explains to the jurors the status of the testimony that is read to them. The failure to read the defendant's instruction, less the comment on the evidence, though perhaps regretable in retrospect, falls short of fundamental error. Our reading of the record reveals no prejudice or abuse of discretion due to the omitted instruction. We find no error.

3. <u>Instruction on the lesser-included offense.</u>

Defendant requested the following jury instruction:

> [T]he crime of murder first degree committed in the course and in furtherance of the crime

> of burglary second degree includes the less serious charge of burglary second degree. The State may prove burglary second degree but fail to prove the more serious crime of murder first degree committed in the course of and in furtherance of the crime of burglary second degree.
>
> You are permitted to find the defendant guilty of the less serious crime of burglary second degree one, if the evidence does now show beyond a reasonable doubt that the defendant is guilty of murder first degree in the course of and in furtherance of the burglary second degree;
>
> And if the evidence does show beyond a reasonable doubt the defendant is guilty of burglary second degree.

The trial court denied this request. Defendant now contends that because burglary is a lesser-included offense of felony murder and because there was sufficient evidence to warrant an instruction, the judge's denial constituted prejudicial error.

We disagree for two reasons. The instruction is incorrect in that it implies that to be guilty of felony murder defendant must be guilty of first degree murder in addition to burglary. This does not correctly state the law. A person may be guilty of felony murder even though the killing standing alone would be second degree murder. It is the fact that the homicide was committed during a felony (burglary) that can raise what otherwise would be a second degree murder to murder in the first degree. It is the felony that provides the malice which makes it first degree murder. State v. Ferrari, 112 Ariz. 324, 541 P.2d 921 (1975). The instruction being incorrect, the judge did not err in refusing to give it. State v. Axley, 132 Ariz. 383, 393, 646 P.2d 268, 278 (1982).

Neither do we believe, as defendant contends, that burglary is a lesser-included offense of felony murder. Garrett v. United States, 471 U.S. ___, 105 S.Ct. 2407, 85 L.Ed.2d 764 (1985).

DEATH PENALTY

The special verdict of the trial court at sentencing stated "There are no mitigating circumstances." Defendant argues that the trial court improperly concluded that there were no mitigating factors. He urges us to remand the case for resentencing and issue guidelines requiring trial judges to give detailed statements of whether and why they have found the existence or nonexistence of mitigating factors. We agree with defendant that the trial court erred and take this opportunity to clarify the procedural requirements of A.R.S. § 13-703(D).

In conducting a hearing in aggravation and mitigation, pursuant to A.R.S. § 13-703, the trial court acts first as the fact finder. It must consider whether the state has proven any of the aggravating factors enumerated in § 703(F) beyond a reasonable doubt. State v. Carriger, 143 Ariz. 142, 692 P.2d 642. It must also determine whether the defendant has shown mitigating circumstances by a preponderance of the evidence. State v. McMurtrey, 143 Ariz. 71, 73, 691 P.2d 1099, 1101 (1984). Mitigating circumstances are defined as "any factors * * * relevant in determining whether to impose a sentence less than death * * *." A.R.S. § 13-703(G). After the trial court has made these findings of fact, it then engages in a balancing test in which it determines whether the mitigating factors are sufficiently substantial to call for leniency. § 703(C).

In the case at bar, defendant introduced evidence that he was a model prisoner. He also argued that there was evidence that another person had been present who did the actual killing. See Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). On appeal, defendant pointed to several other factors, of which the trial court was aware: defendant's lack of a criminal record for violence; defendant's service in the United States Marine Corps and the fact that defendant was 24 at the time of the crime. The presentence report also contained relevant information. Although the investigating officer noted that defendant had been in and out of jail and had failed to keep in contact with his probation officer or take advantage of the rehabilitative process, he described defendant as "an intelligent and personable individual who would probably not plan the murder of an individual * * * for personal gain." Additionally, the officer indicated his agreement with defendant's attorney that the murder was a spontaneous killing.[2] With the exception of defendant's claim that another committed the murders, the state presented no evidence rebutting defendant's proof as to mitigating factors.

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[2] Defendant claimed, at oral argument, that Detective Oviedo, the chief homicide officer on the case, indicated his belief that the victim caught defendant burglarizing her residence and went after him with a hatchet. The only evidence that this was his opinion is found in a letter, attached to the presentence report, written by defendant's attorney paraphrasing the detective. When the probation officer interviewed the detective, however, Oviedo made an official recommendation that defendant receive the death penalty.

A.R.S. § 13-703(D) requires the sentencing court to "return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection F of this section and as to the existence of any of the circumstances included in subsection G of this section." A number of trial courts have interpreted this as requiring them to state, on the record, their reasons and conclusions, as to both the existence and nonexistence of mitigating factors. See e.g., State v. Smith, 141 Ariz. 510, 687 P.2d 1265; State v. Caja, 126 Ariz. 35, 612 P.2d 491 (1980). Although we have previously stated that such detailed findings are neither required nor necessary, State v. Vickers, 129 Ariz. 506, 516, 633 P.2d 315, 325 (1981), we believe that the better practice is for the trial court to place, on the record, a list of all factors offered by a defendant in mitigation and then explain his reasons for accepting or rejecting them. Thus, the reviewing court can be sure that all mitigating factors have been considered by the court prior to sentencing. See Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (United States Supreme Court held unconstitutional death penalty statutes that restricted the right of a defendant to show mitigating circumstances that might relieve him of the death penalty) and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (Requiring courts must consider all relevant mitigating evidence). Id. at 117, 102 S.Ct. at 878, 71 L.Ed.2d at 12. Justice O'Connor, in her concurrence, explained that when it was unclear whether the trial court has considered all mitigating factors, the case must be

remanded:

> In any event, we may not speculate as to whether the trial judge and the Court of Criminal Appeals actually considered all of the mitigating factors and found them insufficient to offset the aggravating circumstances * * *. Woodson and Lockett require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court.

Id. at 119, 102 S.Ct. at 879, 71 L.Ed.2d. at 14. In short, if we cannot determine from the record whether the trial court considered all the relevant mitigating factors, the federal constitution compels us to remand the case for further explanation. Practically, unless the trial judge tells us what factors he has considered and why he has rejected them, we cannot assure ourselves that he has acted properly.

Because we are remanding for new trial, we do not address defendant's other arguments concerning the propriety of his sentence or the constitutionality of the death penalty. Reversed and remanded for new trial.

JAMES DUKE CAMERON, Justice

CONCURRING:

WILLIAM A. WOLFMAN, Chief Justice

JACK D. H. HAYS, Justice

FELDMAN, Justice, concurring in part and dissenting in part,

I agree with the result and with all portions of the opinion except that (slip op. at 20) in which the majority concludes it is unnecessary to give instructions which would permit the jury to find defendant guilty of burglary but not guilty of felony-murder. I believe that under the facts of this case such instructions are required. Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382 (1980).

Defendant admitted that he committed burglary but claimed that Mrs. Rabb was alive when he left the house and that two unidentified persons later entered the house, assaulted and killed her. This version of the events received some support from the testimony of a neighbor who reported having seen two suspicious looking characters peering over the victim's wall. Thus, a clear question of fact was presented and, if defendant's version was believed by the jury, it should have convicted his of burglary but acquitted his of murder. By refusing to give instructions that would have permitted this result, the court presented the jury with the Hobson's choice of either freeing an admitted criminal or convicting his of felony-murder. This is the very result which Beck held was forbidden by the Constitution because it enhances the possibility that the jury will erroneously find the defendant guilty of the felony-murder charge. The risk of such a result "cannot be tolerated in a case in which the defendant's life is at stake." Beck, supra, at 637-638, 100 S.Ct. at 2389-2390.

In reaching their conclusion, the majority of this court cites Garrett v. United States, 471 U.S. ____, 105 S.Ct. 2407 (1985). That case concerned multiple punishments, a legal issue unrelated to the Beck

principle. Further, the majority gains no support from the technical distinctions of lesser included offense made by Arizona cases such as State v. Arias, 131 Ariz. 441, 641 P.2d 1285 (1982).

> The element the Court in Beck thought essential to a fair trial was not simply a lesser included offense instruction in the abstract, but the enhanced rationality and reliability [which] the existence of [such] an instruction introduced into the jury's deliberations. . . .
>
> The Court in Beck recognized that the jury's role in the criminal process is essentially unreviewable and not always rational. The absence of a lesser included offense instruction increases the risk that the jury will convict, not because it is persuaded that the defendant is guilty of capital murder, but simply to avoid setting the defendant free. In Beck, the Court found that risk unacceptable and inconsistent with the reliability this court has demanded in capital proceedings. [citation omitted] The goal of the Beck rule, in other words, is to eliminate the distortion of the fact-finding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence.

Spaziano v. Florida, ___ U.S. ____, 104 S.Ct. 3154, 3160 (1984).

This principle controls the situation presented by the case before s and requires that the burglary instruction be given. In my view, the question is not whether the underlying felony meets the technical definition of a lesser included offense when the charge is felony-murde. Rather, the question is whether the evidence would support a verdict thr the defendant is guilty of the underlying felony but not of felony-murdr. In such a factual context, Beck teaches that the jury cannot be presenti with an all-or-nothing choice but must be given the third option. The ury must be able to reach and decide those issues fairly presented by the

evidence. A different rule cannot be justified.

STANLEY G. FELDMAN, Justice

I join in Justice Feldman's opinion.

FRANK X. GORDON, JR.,
Vice Chief Justice

SUPREME COURT OF THE UNITED STATES

WILLIAM BRACY *v.* ARIZONA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

No. 85–5776. Decided January 27, 1986

The petition for a writ of certiorari is denied.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

Petitioner William Bracy was convicted of two murders and sentenced to death. He claims that the state trial court improperly barred him from pursuing, in his cross-examination of a prosecution witness, the only line of questioning that could have revealed that witness's motivation to shade his testimony in favor of the prosecution. He argues that he was thus denied his Sixth Amendment right to confront the State's witnesses against him. *Davis* v. *Alaska*, 415 U. S. 308 (1974). I believe that petitioner's claim may be substantial, requiring that his conviction be vacated.

In the pending case of *Delaware* v. *Van Arsdall* (84–1279), cert. granted, —— U. S. —— (1985), this Court is to decide whether an absolute denial of cross-examination of a prosecution witness concerning potential bias can ever be harmless error. The Court denies certiorari in this case without even waiting to consider what light the *Van Arsdall* case will shed on the issues here. Because I consider such haste inappropriate, especially when a man's life is hanging in the balance, I dissent from the denial of certiorari.